No. 15-6418

IN THE

Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 2, 2015
CERTIORARI GRANTED JANUARY 8, 2016

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 14-15733

Date Filed	Docket Text
	* * *
01/30/2015	*MOTION for certificate of appealability filed by Appellant Gregory Welch. Opposition to Motion is Unknown [7400990-1]*
03/27/2015	Document filed by Gregory Welch in support of Motion for certificate of appealability filed by Appellant Gregory Welch in 14-15733 [7400990-2].
	* * *
06/09/2015	ORDER: Motion for certificate of appealability filed by Appellant Gregory Welch is DENIED. [7400990-2]; Motion for appointment of counsel filed by Appellant Gregory Welch is DENIED as MOOT. [7444075-2] CRW
07/07/2015	RETURNED UNFILED: Extension of Time filed by Gregory Welch is returned unfiled because it is untimely.
	* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (FORT LAUDERDALE) CIVIL DOCKET FOR CASE #: 0:13-cv-62770-KAM

Date Filed	#	Docket Text
		* * *
12/20/2013	2	MOTION (Complaint) to Vacate Sentence (2255). NOTE: All further docketing is to be done in the civil case. (Criminal Case # 09-60212-CR-MARRA), filed by Gregory Welch.(jc) (Entered: 12/20/2013)
		* * *
02/10/2014	7	RESPONSE TO ORDER TO SHOW CAUSE re 5 Order to Show Cause, by United States of America. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14)(Keene, Jennifer) (Entered: 02/10/2014)

Appendix A

* * *

04/10/2014	15	RESPONSE/REPLY to 7 Answer to Motion (Complaint) to Vacate Sentence (2255) by Gregory Welch. (ar2) (Entered: 04/11/2014)

* * *

09/29/2014	17	REPORT AND RECOMMENDATIONS on 28 USC 2255 case re 2 Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) filed by Gregory Welch. Recommending that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed. Objections to RR due by 10/17/2014 Signed by Magistrate Judge Patrick A. White on 9/29/2014. (tw) (Entered: 09/29/2014)
10/17/2014	18	OBJECTIONS to 17 Report and Recommendations by Gregory Welch. (ar2) (Entered: 10/17/2014)
12/09/2014	19	FINAL JUDGMENT ORDER ADOPTING 17 REPORT AND RECOMMENDATIONS denying 1 petition to vacate pursuant to 2255.

Appendix A

Certificate of Appealability: DENIED. This case is CLOSED. Signed by Judge Kenneth A. Marra on 12/8/2014. (ir)

* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 10-14649

Date Filed	Docket Text
	* * *
03/07/2011	E-Brief Tendered: Appellant brief for Appellant Gregory Welch.
	* * *
04/05/2011	E-Brief Tendered: Appellee brief for Appellee USA.
	* * *
05/09/2011	E-Brief Tendered: Reply brief for Appellant Gregory Welch.
05/17/2011	MOTION to correct or amend brief reply brief. filed by Attorney Brenda G. Bryn for Appellant Gregory Welch. Motion is Unopposed [6307635-1]
	* * *
06/13/2012	Opinion issued by court as to Appellant Gregory Welch. Decision: Affirmed. Opinion type: Published. Opinion method: Signed.
	* * * *

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (FT LAUDERDALE) CIVIL DOCKET FOR CASE #: 0:09-CR-60212-KAM-1

Date Filed	#	Docket Text
08/20/2009	1	INDICTMENT as to Gregory Welch (1) count(s) 1. FORFEITURE ATTACHED (dd) (Entered: 08/20/2009)
		* * *
06/18/2010	33	Minute Entry for proceedings held before Judge Kenneth A. Marra: Change of Plea Hearing as to Gregory Welch held on 6/18/2010 Gregory Welch (1) Guilty Count 1. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 06/18/2010)
06/18/2010	34	VACATED PLEA AGREEMENT/ FACTUAL PROFFER STATEMENT as to Gregory Welch (ir) See DE 42 and 43 Modified on 9/20/2010 (ir). (Entered: 06/18/2010)

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* * *

08/20/2010	37	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Gregory Welch (Birch, Peter) (Entered: 08/20/2010)
09/15/2010	38	SENTENCING MEMORANDUM by Gregory Welch (Attachments: # 1 Appendix)(Birch, Peter) (Entered: 09/15/2010)
09/16/2010	39	NOTICE *of Filing* by Gregory Welch re 37 Objections to Presentence Investigation Report (Attachments: # 1 Attachments)(Birch, Peter) (Entered: 09/16/2010)
09/16/2010	40	SUPPLEMENT to 37 Objections to Presentence Investigation Report filed by Gregory Welch by Gregory Welch (Birch, Peter) Modified on 9/17/2010 (ls). (Entered: 09/16/2010)
09/17/2010	41	RESPONSE to 37 Objections to Presentence Investigation Report by USA as to Gregory Welch (Linder, Jason) (Entered: 09/17/2010)
09/17/2010	42	Minute Entry for proceedings held before Judge Kenneth A. Marra: Change of Plea Hearing as to

		Gregory Welch held on 9/17/2010 Gregory Welch (1) Guilty Count 1. Prior plea of 6/18/10 is VACATED. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 09/20/2010)
09/17/2010	43	PLEA AGREEMENT/FACTUAL PROFFER STATEMENT as to Gregory Welch (ir) (Entered: 09/20/2010)
09/17/2010	44	Minute Entry for proceedings held before Judge Kenneth A. Marra: Sentencing held on 9/17/2010 as to Gregory Welch. Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 09/20/2010)
09/20/2010	45	JUDGMENT as to Gregory Welch (1), Count(s) 1, 180 months BOP, three years supervised release, $100 special assessment. Signed by Judge Kenneth A. Marra on 9/20/2010. (ir) (Entered: 09/20/2010)
09/30/2010	46	NOTICE OF APPEAL by Gregory Welch re 45 Judgment. Within fourteen days of the filing date of a Notice of Appeal, the appellant

must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Birch, Peter) (Entered: 09/30/2010)

12/14/2010 54 TRANSCRIPT of Change of Plea as to Gregory Welch held on 06/18/2010 before Judge Kenneth A. Marra, 1-25 pages, re: 46 Notice of Appeal - Final Judgment, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2011. Redacted Transcript Deadline set for 1/18/2011. Release of Transcript Restriction set for 3/17/2011. (sf) (Entered: 12/14/2010)

12/14/2010 55 TRANSCRIPT of Change of Plea and Sentencing as to Gregory Welch held on 09/17/2010 before Judge Kenneth A. Marra, 1-42 pages, re: 46

Appendix A

		Notice of Appeal - Final Judgment, Court Reporter: Stephen Franklin, 561-514-3768 / Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/7/2011. Redacted Transcript Deadline set for 1/18/2011. Release of Transcript Restriction set for 3/17/2011. (sf) (Entered: 12/14/2010)

* * *

12/20/2013	72	Motion to Vacate under 28 U.S.C. 2255 by Gregory Welch (civil case number 13-62770-CIV-MARRA.) All further docketing related to the motion to vacate is to be done in the civil case. (jc) (Entered: 12/20/2013)
12/09/2014	73	ORDER denying 72 Motion to Vacate (2255) as to Gregory Welch (1). Signed by Judge Kenneth A. Marra on 12/8/2014. (ir) (Entered: 12/09/2014)

Appendix A

08/28/2015	74	MOTION to Reduce Sentence by Gregory Welch. Responses due by 9/14/2015. (ir) (Entered: 08/28/2015)

* * * *

APPENDIX B — MOTION FOR EXTENSION OF TIME, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 7, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 14-15733-C
0:13-CV-62770-KAM
0:09-CR-60212-KAM-1

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA

Comes now Petitioner Gregory Welch most humbly request for an extension of time based on the fact the Supreme Court ruling in *Johnson v. United States*, 134 S. Ct. 1871 (2015). Petitioner does not have access to the Opinion based on the fact he is unable to receive access to adequate legal material in time to supplement his request. Petitioner basically needs more time to prepare a motion to reconsider based on the fact his conviction is now unconstitutional and he needs more time to prepare his argument because his original request was not heard on any of the merits.

Thank you

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT
OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

July 7, 2015

Gregory Welch
FCI Coleman Medium – Inmate Legal Mail
PO Box 1032
COLEMAN, FL 33521-1032

Appeal Number: 14-15733-C
Case Style: *Gregory Welch v. USA*
District Court Docket No.: 0:13-cv-62770-KAM
Secondary Case Number: 0:09-cr-60212-KAM-1

RETURN UNFILED: Extension of Time filed by Gregory Welch is returned unfiled because it is untimely. The 21 days to file your reconsideration has expired. You may file a motion for reconsideration. You would have to also file a motion to file Out Of Time.

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 9, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15733-C

GREGORY WELCH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Gregory Welch moves for a certificate of appealability in order to appeal the denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Welch's motion for appointment of counsel is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX D — MOTION TO SUPPLEMENT CERTIFICATE OF APPEALABILITY, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 27, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 13-62770-CIV-MARRA
9-60212-CR-MARRA

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO SUPPLEMENT/ CERTIFICATE OF APPEALABILITY

COMES NOW, Petitioner Gregory Welch, *pro-se*, requests that this Court Grants this Supplement / Amendment pursuant to the Fed. R. Crim. P. Rule 15, governing Supplemental Authority. Welch asks the Court to hold this case in Abeyance until *United States v. Johnson* (13-7120), Welch's request that this Court vacate his ACCA conviction, based on the fact he was sentenced under the "*Residual Clause*" of the ACCA, 924(e)(2)(B)(ii). Welch objected to the ACCA in the District Court, also in this

Court. Pursuant to *United States v. Beckles*, 565 F.3d 832. "undisputed facts that are not objected are accepted as true." Welch objected to the P.S.I. also, to the information that was used to come to the conclusion, which violated *United States v. Shepard*, 544 U.S. 13, non-approved documentation.

CONCLUSION

Petitioner hopes and prays the Honorable Court will GRANT this Supplement / Certificate of Appealability.

Respectfully Submitted,

March 13, 2015
Executed On

/s/
Gregory Welch, #75675-004
FCC-COLEMAN-MEDIUM,
POB 1032
COLEMAN, FLORIDA 33521-1032

APPENDIX E — MOTION FOR CERTIFICATE OF APPEALABILITY, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 30, 2015

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 14-15733-C

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR CERTIFICATE OF APPEALABILITY TO THE COURT OF APPEALS

COMES NOW, Appellant files this Certificate of Appealability, pro-se. Appellant is a layman of the Law, unskilled in the Law, therefore, request that this Motion for a Certificate of Appealability be construed liberally. *Haines v. Kerner*, 404 U.S. 519 (1972).

Appellant states the following reasons why he should be granted a Certificate of Appealability:

1). Appellant's plea was based on a 1-10 year sentence, however, several months later, Appellant received a plea for 15 years to life. This was after the Appellant had given

up all of his rights and waived all of his statute rights away, based on a 1-10 year plea.[1] Had Appellant known that he was going to be declared as an armed career offender, he would never ever have pled guilty. But would have instead proceeded directly to trial, and proved his innocence in a Court of Law.

2). Counsel had an agreement with the Government for a 0-10 year plea.[2] Which became involuntary, unintelligent and unknowingly when the Government reneged on the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971). Appellant had already been debriefed about his case and all of that information was included in the plea agreement of the ten year plea agreement. Therefore, when the Government reneged on the plea agreement, of the 1-10 years, it became involuntary, invalid and Appellant should never have been sentenced to 15 years in a Federal prison. See *Santobello v. New York*, 404 U.S. 257 (1971). Appellant's Sixth Amendment rights to effective assistance of counsel was violated when counsel allowed the 0-10 year plea agreement to be breached. Appellant was prejudiced by the breach of the plea agreement and caused the Appellant 15 years in a Federal prison ineffectively. *Strickland v. Washington*, 466 U.S. 466 (1984); *Cronic v.*

---

1. Petitioner's 6th Amendment right was violated when counsel failed to object to the fact under Rule 11(a)(c), once a Plea is accepted only the Court can reject the Plea (NOT the attorney) ONLY the Court.

2. *Lalfer v. Cooper*, 132 S.ct. 1399; *Missouri v. Frye*, 132 S.Ct. 1376, the Court clarified that the Sixth Amendment right to the effective assistance of counsel extends specifically to the negotiation and consideration of Pleas that lapse or are rejected.

United States, 466 U.S. 648 (1984); *Hill v. United States*, 368 U.S. 424-429 (1962); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Padilla v. Kentucky*, 130 S.Ct. 1476 (2010); and *Hill v. Lockhart*, 474 U.S. 48-52 (1985). It was as if the United States District Court never even looked at Appellant's argument one. A Certificate of Appealability should issue in this case, based on violations of the Appellant's Fifth Amendment rights to due process and his Sixth Amendment rights to effective assistance of counsel, which prejudiced the Appellant and caused him 15 years in a breached plea agreement. Jurists of reason would say that this case deserves more encouragement and should be developed further. Appellant has shown in this argument one, a denial of his Fifth, Sixth, and Eighth Amendments to due process, ineffective assistance of counsel, and cruel and unusual punishment for the Government to have breached the plea agreement when in fact, it had already agreed to a 0-10 year sentence, and reneged on the agreement and sentenced the Appellant, based on a totally different plea agreement, for which was never the basis of the first plea agreement.

Because Appellant has shown a denial of his Constitutional rights in violation of *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Slack v. McDaniels*, 529 U.S. 473 (2000); and *Miller El v. Cockrell*, 537 U.S. 322 (2003). Appellant request remand of his involuntary, unintelligent, and unknowing plea agreement. Had Appellant known his first plea agreement would be reneged on by the Government, he would have never pled guilty at all and would have proceeded directly to trial and proven his innocence in

a Court of Law. See Appellant's June 18, 2010, first plea agreement, on Page 19 and Page 20, Line 1-9, based on Appellant's 0-10 year plea agreement that was totally breached by the Government and counsel.

Appellant states that he has just shown several Constitutional violations in regards to *Barefoot v. Estell, supra.*; *Miller El v. Cockrell, supra.*; and *Slack v. McDaniels, supra.*

2). Appellant state that his armed career offender status, for State of Florida priors, Docket Nos.: 1996-CF-005680 (Robbery conviction); 1996-CF-001575 (Robbery conviction); and 2003-CF-17694 (Battery). These state priors violate *United States v. Johnson*, 13-720 8th Cir. 526 F.Appx. 708, 2013, in the United States Supreme Court, pending an April, 2015, oral argument briefing. Appellant's state priors, also, violate *Shepard v. United States*, 544 U.S. 13, 26 (2005), because there was no *Shepard* documentation to verify these state priors, as being legally legitimate. See also, *Taylor v. United States*, 495 U.S. 575 (1990), in regards to the categorical approach; and *Descamps v. United States*, 133 S.Ct. 1265 (2010); *Begay v. United States*, 129 S.Ct. 1581 (2008); and *United States v. Day*, 465 F.3d 1265 (11th Cir. 2006).

All of these cases state that Appellant's armed career offender status is unconstitutional and violate the Appellant's Fifth Amendment right to notice of the state priors, and the proper documentation for armed career offender status, for which was never used according to *Shepard, Taylor*, and *Descamps, supras.* Appellant's Sixth

Appendix E

Amendment rights were also violated based on counsel's ineffectiveness, in not pursuing the unconstitutionality of Appellant's career offender status, all the way to the United States Supreme Court, based on improper *Shepard, Taylor, Day,* and *Descamps* requirements that presentedly violate the Appellant's Fifth Amendment rights to due process of proper notice and legally verified state documentation, Appellant's Sixth Amendment right to effective assistance of counsel which prejudiced and caused the Appellant 15 years as an armed career offender when in fact, he was never legally an armed career offender and should never have been declared one, either according to his Fifth, Sixth, and Eighth Amendment rights to cruel and unusual punishment, for which he remains incarcerated, based on an armed career offender status, for which he never was eligible for such status at all according to all of the above stated reasons.

Jurists of reason would agree that this argument deserves further encouragement, and should be developed further. Jurists would also agree that Appellant has shown violations of his Constitutional rights and that they have been violated and denied to the Appellant based on the above stated reasons. And based on *Slack v. McDaniels*; *Miller El v. Cockrell*; and *Barefoot v. Estelle, supras,* Appellant would never have pled guilty had he known his Constitutional rights would be violated in this manner, based on invalid, inadequate, insufficient, and none-certified documentation, that caused the Appellant to be unconstitutionally denied his Fifth, Sixth, and Eighth Amendment rights. Jurists of reason would agree that this claim deserves further encouragement. Based on all

of the above stated reasons, and that Appellant has shown denials of his Constitutional rights, therefore, deserves a Certificate of Appealability.

CONCLUSION

Appellant hopes and prays that he will be granted a Certificate of Appealability and to counsel, based on his indigency status, for which he cannot afford counsel, that is why his Certificate of Appealability is pro-se, and Appellant is a layman of the Law, unlearned in the Law, and therefore request counsel in this case.

January 12, 2015
Executed On

Respectfully Submitted,

/s/_____

Gregory Welch
#73675-004
FCC-COLEMAN-MEDIUM
POB 1032
COLEMAN, FLORIDA
33521-1032

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 14-15733

GREGORY WELCH,

Appellant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S REQUEST FOR APPOINTMENT OF COUNSEL

COMES NOW, Appellant is a layman of the Law, and unlearned in the Law, and because he is unlearned in the Law, and requested the assistance of jail house, pro-se litigant Donald G. Green, #39747-019, Coleman, Unit B-2, Appellant request counsel, based on his indigency status, and layman of the Law status in the Event he is granted a Certificate of Appealability.

CONCLUSION

Appellant hopes and prays for the Appointment of Counsel, based on the above stated reasons.

Appendix E

January 12, 2015
Executed On

Respectfully Submitted,

/s/_____
Gregory Welch
#73675-004
FCC-COLEMAN-MEDIUM
POB 1032
COLEMAN, FLORIDA
33521-1032

APPENDIX F — FINAL JUDGMENT AND REPORT OF MAGISTRATE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED DECEMBER 9, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-CIV–MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT AND REPORT OF MAGISTRATE

For the reasons stated in the Report of the Magistrate Judge (DE 17) and upon independent *de novo* review of the file, and over the objections having been filed (DE 18), it is **ORDERED AND ADJUDGED** as follows:

1) The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition to vacate pursuant to 28 U.S.C. § 2255 is **DENIED.**

2) Under Rule 11(a) of the Rules 'Governing Section 2255 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. Because the Court is adopting the Magistrate Judge's Recommendation denying the motion to vacate brought under 28 U.S.C. § 2255, the Court must consider whether to issue or deny the certificate of appealability at this time.

In order for this court to grant a COA, Movant must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), such that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The Court concludes under *Slack* that Movant cannot show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Therefore, the Court **DENIES** a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

3) All motions not otherwise ruled upon are **DISMISSED AS MOOT**.

4) The case is **CLOSED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 8th day of December 2014.

/s/
KENNETH A. MARRA
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62770-Civ-MARRA

(09-60212-Cr-MARRA)

MAGISTRATE JUDGE P. A. WHITE

GREGORY WELCH,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF MAGISTRATE JUDGE

I. Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, challenging the constitutionality of his conviction and sentence for possession of a firearm and ammunition in and affecting interstate and foreign commerce entered following a guilty plea in case no. 09-60212-Cr-Marra.

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b) (1)

(B) and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion (Cv-DE#1), together with the government's response (Cv-DE#7) to this court's order to show cause with multiple exhibits, the movant's traverse (Cv-DE#15),[1] the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the change of plea and sentencing transcripts.

Construing the movant's §2255 motion liberally as afforded *pro se* litigants pursuant to *Haines v. Kerner*, 404 U.S. 519 (1972), in his motion to vacate (Cv-DE#1), movant challenges the voluntariness of his plea and his ensuing sentence as an armed career criminal. Movant alleges he was denied effective assistance of counsel, where his lawyer allowed him to be sentenced as an armed career criminal thereby making his plea not knowing and voluntary. (Cv-DE#1:4).

---

1. The movant's traverse was also filed on CM/ECF at Cv-DE#14, but it has pages missing. The complete traverse is docketed on CM/ECF at Cv-DE#15.

Appendix F

II. Factual Background and Procedural History

A. Facts of the Offense[2]

The stipulated factual proffer reveals as follows. On March 17, 2009, law enforcement officers searched movant's apartment. (Cr-DE#43). At that time, they discovered a loaded Lorcin, Model L380, .380-caliber, semi-automatic pistol, bearing serial number 532504, in the attack space of the apartment. (*Id.*). The firearm was loaded with six rounds of ammunition, five of which were Winchester, .380-caliber ammunition, and one was a Remington, .380-caliber bullet. (*Id.*). Movant further stipulated that the firearm and all of the ammunition had traveled in interstate or foreign commerce. (*Id.*). Next, he agreed that he was a previously convicted felon. (*Id.*).

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On August 20, 2009, the movant was charged by Indictment with felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1).[3] (Cr-

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2. The facts of this case have been obtained from the factual proffer executed by the movant and made part of the Rule 11 change of plea proceeding. (Cr-DE#43:Factual Proffer; Cr-DE#55:Change of Plea/Sentencing Transcript).

3. The maximum sentence exposure for being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1), is ten years in prison. However, if a felon in possession has three prior convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act, 18 U.S.C. §924(e), requires a minimum sentence of 15 years imprisonment.

DE#1; Cv-DE#7:Ex.2). On March 29, 2010, the movant filed a pretrial motion to suppress evidence, arguing that the search was unlawful and the evidence seized as a result therefrom should be suppressed. (Cr-DE#16). Following an evidentiary hearing, the court entered an order denying the motion. (DE#31).

On June 18, 2010, movant entered into a negotiated plea agreement, in which he agreed to plead guilty as charged, acknowledging that the firearm and ammunition were found in his apartment, but preserving his right to appeal the court's denial of his motion to suppress. (Cr-DE#54). At that time, the terms of the plea agreement called for a maximum sentence of up to 10 years in prison, for violation of 18 U.S.C. §922(g)(1). (Cr-DE#54:8).

However, on September 8, 2010, movant agreed to vacate his prior plea, and in fact, executed a revised, negotiated written plea agreement, agreeing to plead guilty as charged. (Cr-DE#43). The terms of the agreement were modified in part to reflect movant's agreement and understanding that he faced a minimum of 15 years and up to a maximum of life imprisonment, for violation of §922(g). (*Id.* :2). The movant acknowledged and understood that the court would impose sentence after considering the advisory guidelines, based in part on a PSI, which would be prepared after the plea is entered. (*Id.* :2-3). The movant further acknowledged that the court was not bound to impose a guideline sentence, and was permitted to tailor the sentence in light of other statutory concerns, which may be more or less severe than the guidelines. (*Id.*).

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Movant understood that the court had the authority to impose up to the statutory maximum authorized by law for the offense of conviction, and that he could not withdraw his plea solely as a result of the sentence imposed. (*Id.*). In fact, movant understood that the sentence had not yet been determined by the court, and any estimate of the probable sentencing range or ultimate sentence from either defense counsel, the government, or the probation office was a prediction, not a promise, and therefore, not binding on the government, the probation office, or the court. (*Id.* :6-7). He also indicated he had entered into the plea freely and voluntarily, and that no threats or promises, other than as contained in the written agreement, were made to induce him to change his plea to guilty. (*Id.* : 7).

Although acknowledging it would not be binding on the probation officer or the court, the parties agreed to jointly recommend up to a three level reduction to movant's base offense level based on his timely acceptance of responsibility. (*Id.* :4-5). As part of the modified agreement, the government also consented to the movant's entry of a conditional guilty plea, allowing movant to reserve the right to appeal the denial of his motion to suppress physical evidence. (*Id.* :8).

Movant also stated that there was sufficient evidence to convict him of the charged offense, as follows. (*Id.* : 5-6). On March 17, 2009, his apartment was searched by law enforcement. (*Id.*). At that time, they discovered in the attic space a loaded Lorcin, Model L380, .380-caliber semi-automatic pistol, bearing serial number 532504. (*Id.*). The firearm contained six rounds of ammunition.

(*Id.*). Five of the rounds were Winchester and one was a Remington. (*Id.*).

On September 17, 2010, movant appeared for a new change of plea proceeding. (Cr-DE#55). At that time, the government explained that when movant initially entered his change of plea in June 2010, neither party had contemplated that the movant qualified as an armed career criminal. (*Id.* :2). As a result, the movant was not advised that his maximum exposure was significantly greater than 10 years. (*Id.* :2-3). As a result, the government stated that the parties had recently executed another written plea agreement similar to the prior agreement. (*Id.*). The new agreement was modified to reflect the fact that movant faced a 15-year minimum mandatory and up to a term of life imprisonment for the charged offense. (*Id.* :3). Further, the modified agreement permitted movant to enter a conditional guilty plea, omitted the appellate waiver contained in the prior agreement, thereby enabling him to appeal the denial of his suppression motion, along with the lawfulness of the sentence to be imposed. (*Id.* :3). The court then asked defense counsel whether the government's representations were correct, to which counsel responded that the movant potentially faced an enhanced sentence as an armed career criminal, but movant was reserving the right to litigate the validity of the enhancement at sentencing. (*Id.*).

Thereafter, the district court conducted a careful and meticulous plea colloquy pursuant to Fed.R.Cr.P. 11. (Cr-DE#55). After movant was given the oath, he was cautioned by the court that if he made any false statements

during the proceedings, it could be used against him in a prosecution for perjury. (*Id.* : 3). Movant then provided background information regarding his age, educational background, and whether he could read and write English. (*Id.* : 4-5).

Movant understood and agreed to set aside his previously entered guilty plea, and to go forward with a new, modified written plea agreement. (*Id.* :6). Movant acknowledged that the new plea agreement allowed him to appeal the sentence imposed, as well as, the court's ruling on movant's motion to suppress. (*Id.*). When asked if, in fact, he wanted to set aside the prior plea, and enter into the new plea agreement, movant responded that he did. (*Id.*). Movant indicated he had consulted with his attorney about this decision, and they were both in agreement on proceeding with the new plea agreement. (*Id.*). When asked again whether he believed the case should be resolved based on the new agreement with the government, movant indicated that it should. (*Id.* :8).

Movant further acknowledged reviewing and discussing with counsel the Indictment, along with the government's evidence against him. (*Id.* :7). He also indicated he discussed possible defenses with counsel, and acknowledged counsel had done more than he had anticipated for him, and had provided more than competent advice. (*Id.* :8). He stated there was nothing further he had wanted done by counsel to defend against the charge. (*Id.*).

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Movant testified that he read the new agreement and then fully and completely discussed it with his attorney. (*Id.* :8). He denied anyone threatening or forcing him to change his plea from not guilty to guilty, stating he was doing so freely and voluntarily. (*Id.* :9). Next, again acknowledged the charge against him, as set forth in the Indictment, and further understood that given his criminal history, he may be subject to an enhanced sentence, exposing him to a 15-year minimum and up to a maximum of up to life imprisonment. (*Id.* :10). He acknowledged that the sentence would be imposed after the court considered the advisory guideline sentence, as set forth in the PSI, which had already been prepared. (*Id.* :11-12). He also acknowledged that after the Rule 11 proceeding, there would be a discussion with the court concerning his disagreement with the contents of the PSI, and in particular, with the recommendation that movant receive an enhanced sentence as an armed career criminal. (*Id.* :12). Movant further understood that his guideline range would be reduced three levels based on his timely acceptance of responsibility. (*Id.* :13). He also acknowledged that the guidelines were not binding or mandatory, and that the court would be able to fashion a sentence above or below the guideline range. (*Id.* :15-16).

Movant also acknowledged and agreed with the accuracy of the facts as set forth in paragraph 10 of the written plea agreement. (*Id.* :13). He indicated those facts support the charge to which he was pleading guilty. (*Id.* :14). He also acknowledged his agreement to forfeit any claim of ownership or title to the firearm and ammunition seized in connection with the case. (*Id.*).

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Notably, movant understood he was entering into a conditional plea because he had reserved the right to appeal the denial of his motion to suppress, along with the lawfulness of the sentence to be imposed. (*Id.* :14). Movant again denied being made any promises or representations, other than set forth in the plea agreement as to the ultimate sentence to be imposed. (*Id.* :16).

Movant acknowledged and understood that by pleading guilty, he was waiving his right to a jury trial and to call witnesses, present evidence, testify on his own behalf, etc. (Id. :18-20). Movant further understood that if the court accepted the plea, he would also lose valuable civil liberties, and that the plea could have additional collateral consequences, including deportation, if he were not a United States citizen. (*Id.* :20.). Next, when asked by the court how he wished to plead, movant stated, "Guilty, sir." (*Id.* :20).

As a result of the foregoing, the court found the movant was fully competent and capable of entering into an informed plea, that he was aware of the nature of the charge and consequences of the plea, that his plea was knowing and voluntary, and supported by an independent basis in fact as to each of the essential elements of the offense. (*Id.* :21). Thereafter, the court accepted movant's plea, and adjudicated him guilty of the offense charged in the Indictment. (*Id.*).

The PSI prepared for sentencing which reveals as follows. The probation officer set the base offense level at 24, pursuant to U.S.S.G. §2K2.1(a)(4)(A), because the

offense of conviction involved possession of a firearm by a convicted felon who had committed the offense of conviction after having at least two prior felony convictions of crimes of violence. (PSI ¶15). However, the base offense level was then increased to a level 33 because the movant was subject to an enhanced sentence, pursuant to U.S.S.G. § 4B1.4(a), as an armed career criminal. (PSI ¶:21). Three levels were deducted from the base offense level based on movant's timely acceptance of responsibility, resulting in a total adjusted offense level 30. (PSI ¶¶21-24).

Next, the probation officer determined movant had a total of 14 criminal history points, resulting in a criminal history category VI. (PSI ¶¶40-41). The criminal history category remained the same even with the armed career criminal enhancement, pursuant to U.S.S.G. §4B1.4(c)(3). (PSI ¶42). Based on a total offense level 30 and a criminal history category VI, at the low end, movant's total advisory guideline exposure was 168 to 210 months in prison. (PSI ¶86; Cr-DE#55:22). However , statutorily, movant was facing a minimum mandatory term of imprisonment of 180 months in prison. (Cr-DE#55:22).

Defense counsel, having previously filed objections to the PSI's determination that movant qualified for an enhanced sentence as an armed career criminal (Cr-DE#s37-40), renewed the objections at sentencing. (Cr-DE#55:23-40). After considering the statement of all parties, the PSI containing the advisory guidelines, along with the 18 U.S.C. §3553(a) statutory factors, the court sentenced petitioner to the statutory minimum mandatory term of 180 months imprisonment, to be followed by a

term of 3 years supervised release. (Cr-DE#55:39-40; Cr-DE#45).

Movant appealed, challenging the denial of his motion to suppress, as well as, the constitutionality of his enhanced sentence as an armed career criminal. *See United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012); (Cr-DE#69). On June 13, 2012, the Eleventh Circuit *per curiam* affirmed the denial of the suppression motion, along with the enhanced sentence, in a published opinion. *United States v. Welch, supra.* Certiorari review was denied on January 7, 2013. *Welch v. United States*, __U.S. __ 133 S. Ct. 913, 184 L.Ed.2d 702 (2013); (Cr-DE#71).

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final at the latest on **January 7, 2013,** when certiorari review was denied by the United States Supreme Court.[4] Less than one year later, the movant returned to this court filing the instant motion to vacate

4. The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986); *accord, United States v Kaufman*, 282 F.3d 1336 (11th Cir. 2002). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. *Sup.Ct.R.* 13; *see also, Close v. United States*, 336 F.3d 1283 (11th Cir. 2003).

with supporting memorandum, pursuant to 28 U.S.C. §2255, on **December 9, 2013.**[5] (Cv-DE#s1,2).

III. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255. *See Lynn v. United States*, 365 F.3d 1225, 1232-33 (11th Cir. 2004) (stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), *cert. den'd*, 543 U.S. 891, 125 S. Ct. 167, 160 L. Ed. 2d 154 (2004). It is well-established that a Section 2255 motion may not be a

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5. The §2255 and supporting memorandum are neither signed nor dated. Although the exact date it was mailed cannot be determined, the undersigned has utilized the Clerk's receipt date for purposes of the filing date. It is worth noting that due to lack of verification, the motion, as currently filed, is subject to dismissal. *See* Rule 2(b)(5) of the Rules Governing §2255 Proceedings in District Courts. Since movant cannot prevail on any of the claims presented, the undersigned has addressed the merits of the claims in the alternative. By separate order, the undersigned has directed movant to verify the §2255 motion under penalty of perjury. His failure to do so prior to the district court's consideration of this Report and ensuing Order may result in dismissal of this action on that basis, in the alternative.

substitute for a direct appeal. *Id.* at 1232 (*citing United States v. Frady*, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71. L.Ed.2d 816 (1982)).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant must assert all available claims on direct appeal." *Lynn, supra* (*citing Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn*, 365 F. 3d at 1232-33 (*quoting Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *Frady*, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment).

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Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 1940, 167 L.Ed.2d 836 (2007). *See also Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002) (explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. *Id.*

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a

plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005); *United States v. Mosley*, 173 F.3d 1318, 1322 (11th Cir. 1999).

After a criminal defendant has pleaded guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only raise jurisdictional issues, *United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003), *cert. den'd*, 540 U.S. 1149 (2004), attack the voluntary and knowing character of the guilty plea, *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992), or challenge the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty, *United States v. Fairchild*, 803 F.2d 1121, 1123 (11th Cir. 1986). To determine that a guilty plea is knowing and voluntary, a district court must comply with Rule 11 and address its three core concerns: "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands

the nature of the charges, and (3) understands the consequences of his plea." *Id.*; *see also, United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005) (*per curiam*); *United States v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005).[6]

In other words, a voluntary and intelligent plea of guilty made by an accused person must therefore stand unless induced by misrepresentations made to the accused person by the court, prosecutor, or his own counsel. *Brady v. United States*, 397 U.S. 742, 748 (1970). If a guilty plea is induced through threats, misrepresentations, or improper promises, the defendant cannot be said to have been fully apprised of the consequences of the guilty plea and may then challenge the guilty plea under the Due Process Clause. *See Santobello v. New York*, 404 U.S. 257 (1971).

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6. In *Moriarty*, the Eleventh Circuit specifically held as follows:

> [t]o ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters about which the court is required to inform the defendant prior to accepting a guilty plea, including: the right to plead not guilty (or persist in such a plea) and to be represented by counsel; the possibility of forfeiture; the court's authority to order restitution and its obligation to apply the Guidelines; and the Government's right, in a prosecution for perjury, to use against the defendant any statement that he gives under oath.

Id.

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B. Ineffective Assistance of Counsel principles

Because the movant suggests in the motion that counsel rendered ineffective assistance, this Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Harrington v. Richter*, _U.S. _., 131 S.Ct. 770, 788 (2011). *See also Premo v. Moore*, _ U.S. _, 131 S.Ct. 733, 739-740 (2011); *Padilla v. Kentucky*, 559 U.S. 356, 367, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010). If the movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs). *See also Butcher v. United States*, 368 F.3d1290, 1293 (11th Cir. 2004); *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). With regard to the prejudice requirement, the movant must establish that,

but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Allen v. Sec'y, Fla. Dep't of Corr's*, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369 (*quoting Strickland*, 466 U.S. at 687).

In the context of a guilty plea, the first prong of *Strickland* requires petitioner to show his/her plea was not voluntary because he/she received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he/she would have entered a different plea. *Hill*, 474 U.S. at 56-59. If the petitioner cannot meet one of *Strickland's* prongs, the court does not need to address the other prong. *Dingle v. Sec'y for Dep't of Corr's*, 480 F.3d 1092, 1100 (11th Cir.), *cert. den'd*, 552 U.S. 990 (2007); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir.), *reh'g and reh'g en banc den'd by, Holladay v. Haley*, 232 F.3d 217 (11th Cir.), *cert. den'd*, 531 U.S. 1017 (2000).

However, a defendant's sworn answers during a plea colloquy must mean something. Consequently, a defendant's sworn representations, as well as representation of his/her lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir.), *cert. den'd*, 513 U.S. 864 (1994); *United States v. Niles*, __ F.3d __, 2014 WL 1876276 (11th Cir. May 12, 2014) (unpublished.).[7]

A criminal defendant is bound by his/her sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. *See Scheele v. State*, 953 So.2d 782, 785 (Fla. 4 DCA 2007) ("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); *Iacono v. State*, 930 So. 2d 829 (Fla. 4 DCA 2006) (holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

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7. "Unpublished opinion are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. The Court notes this same rule applies to other Fed. Appx. cases cited herein.

Moreover, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. *Glover v. United States*, 531 U.S. 198, 203-04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

Furthermore a §2255 movant must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-07 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr's*, 697 F.3d 1320, 1333-34 (11th Cir. 2012); *Garcia v. United States*, 456 Fed. Appx. 804, 807 (11th Cir. 2012) (*citing Yeck v. Goodwin*, 985 F.2d 538, 542 (11th Cir. 1993); *Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992); *Tejada v. Dugger*, 941 F. 2d 1551, 1559 (11th Cir. 1991), *cert. den'd, Tejada v. Singletary*, 502 U.S. 1105 (1992); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (*citing Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); *United States v. Ross*, 147 Fed.Appx. 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." *Chandler*, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would

have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle*, 480 F.3d at 1099; *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" *Dingle*, 480 F.3d at 1099 (*quoting Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

IV. Threshold Issues

The government concedes that this federal proceeding was instituted less than a year after movant's conviction became final. (Cv-DE#9). As will be recalled, movant's conviction became final at the latest on **January 7, 2013,** when certiorari review was finally denied by the United States Supreme Court. For purposes of the AEDPA' s one-year federal limitations period, the movant was required to file this motion to vacate within one year from the time the judgment became final, or no later than **January 7, 2014.** *See Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1986); *see also, See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (*citing Ferreira v. Sec'y, Dep't of Corr's*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the

limitations period expires on the anniversary of the date it began to run); *accord United States v. Hurst*, 322 F.3d 1256, 1260-61 (10th Cir. 2003); *United States v. Marcello*, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Pursuant to the mailbox rule, movant's motion was filed on **December 9, 2013,** less than a year after his conviction became final. Therefore the government's argument is correct and this federal petition is not time-barred.

V. Discussion

In this federal habeas petition, movant argues that his guilty plea was not knowing and voluntary because his lawyer failed to inform him that he would be subject to an enhanced sentence as an armed career criminal. (Cv-DE#1; Cv-DE#2:2). He claims that but for counsel's deficiency, he would not have accepted the 15-year plea and would have proceeded to trial. (Cv-DE#2:Memo:2). Petitioner concedes he was told at the second change of plea proceeding that he was "potentially being considered as an armed career offender," but maintains he was not told that he did, in fact, qualify for such an enhancement. (*Id.*). He maintains he told counsel he did not want to go through with accepting the second plea offer, but counsel coerced and/or otherwise verbally forced him into doing so. (*Id.* :3). According to petitioner, knowledge of his status as an armed career criminal did not come to the government and defense counsel's attention until after he accepted the first plea and was debriefed by the government. (*Id.*). He claims that, had he known the government would utilize his debriefing to enhance his sentence, he would never have negotiated a plea. (*Id.*). Lastly, movant suggests

that the prior convictions used to support his enhanced sentence violate the Supreme Court's decisions in *Begay* and *Descamps*. (*Id.* :4). Finally, movant suggests that had he proceeded to trial, he only faced a- total guideline sentencing range of 51 to 63 months in prison. (*Id.* :6) Of course, his calculations are mistakenly premised on a sentencing range without the armed career criminal enhancement. (*Id.*).

A. Voluntariness of Plea

As previously narrated, movant pleaded guilty to being a felon in possession of a firearm and ammunition. His claims challenging counsel effectiveness leading up to and resulting in the Rule 11 change of plea proceeding are clearly refuted by the record, and/or otherwise waived due to the entry of a knowing and voluntary plea.

The law is clear that a movant waives or more accurately, forfeits his right to contest all non-jurisdictional defects and defenses, when he enters a knowing and voluntary guilty plea. S*ee United States v. Broce*, 488 U.S. 563 (1989); *McMann v. Richardson*, 397 U.S. 759 (1970) (voluntary guilty plea waives all non-jurisdictional defects); *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008), *quoting, Wilson v. United States*, 962 F.2d 996 (11th Cir. 1992) (claim of ineffective assistance of counsel relating to pre-plea issues waived by voluntary guilty plea); *McCoy v. Wainwright*, 804 F.2d 1196, 1198 (11th Cir. 1986) (voluntary guilty plea waives all non-jurisdictional defects); *see also, United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000), *citing, United States v. Smallwood*,

920 F.2d 1231, 1240 (5th Cir. 1991); *Smith v. United States*, 447 F.2d 487, 488 (5th Cir. 1971), *citing, Hayes v. Smith*, 447 F.2d 488 (5th Cir. 1971). "This includes claims of ineffective assistance of counsel except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary." *United States v. Glinsey*, 209 F.3d at 392.

In this case, review of the record confirms that the movant's plea was knowing and voluntary, and therefore, the movant has waived any defenses be may have had prior thereto to the charged conduct. *See United States v. Moriarty*, 429 F.3d 1012, 1019 (2005). The transcript of the change of plea proceedings confirms that the court conducted a thorough Rule 11 proceeding. In pertinent part, the movant acknowledged under oath that he was satisfied with counsel's representation, that he discussed the charges and the evidence with counsel, as well as, possible defenses prior to the change of plea. Movant also acknowledged the rights he was waiving by entering into the plea, and further denied being forced, or otherwise coerced by counsel or anyone into changing his plea.

It is also evident that the movant understood the facts and the elements of the offense upon which the charge rested. Moreover, by way of entering into the negotiated plea agreement, the movant was telling his lawyer not to conduct any further investigation and not present at a pre-trial or trial proceeding any legal defenses, that he may be entitled to as it related to his case. More importantly to the issue of his enhanced sentence, movant acknowledged he was facing a 15-year minimum and up to a term of life imprisonment based on the offense of conviction. Under

these circumstances, no showing has been made that the plea was anything but knowing and voluntary. It further bears mentioning that movant's suggestion that he was forced and/or otherwise coerced by counsel to change his plea is clearly refuted by the record.

Thus, where movant swore under penalty of perjury at the change of plea proceeding that no one had threatened, coerced, or forced him into entering a guilty plea, there is a strong presumption that his representations are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994); *see also United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) ("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

As a result, even if counsel the defense and the government were unaware early on, when the first Rule 11 proceeding was conducted, that movant was facing an enhanced sentence as an armed career criminal, certainly by the time the knowing and voluntary second plea proceeding was concluded, movant was aware he was facing such a sentence exposure. He further acknowledged exploring the issue with counsel. In fact, contrary to the movant's arguments here, counsel did in fact argue against the enhanced sentence. Specifically, defense counsel argued that the prior state court convictions did not qualify as prior crimes of violence for purposes of the armed career criminal enhancement. Therefore, they could not be utilized as predicate offenses. Under these circumstances, movant has not demonstrated that [any that] further argument, as suggested movant here,

would have resulted in a lesser sentence. In other words, a sentence without the enhancement. As a result, he cannot satisfy the prejudice prong under *Strickland* and is thus entitled to no relief on this claim. *See United States v. Ross*, 143 Fed.Appx. 936 (11th Cir. 2005) ("the district court was within its authority to discredit any allegations that Ross's counsel was ineffective which were contrary to the statements he made under oath at the plea hearing").

Moreover, movant has not overcome the presumption that his statements under oath at the Rule 11 proceeding were true and correct. *See generally United States v. Clayton*, 447 Fed.Appx. 65 (11th Cir. 2011) (defendant received close assistance of counsel where, during plea colloquy, defendant "confirmed that he had discussed the charges, plea agreement, and guidelines with his lawyer, had been given adequate time to consult with his lawyer, and was satisfied with his lawyer's representation," and had not "overcome the strong presumption that statements made during the plea colloquy are true"); *United States v. Price*, 139 Fed.Appx. 253 (11th Cir. 2005) (no abuse of discretion in denying motion to withdraw guilty plea where plea hearing transcript "makes clear that the district court went through Price's rights with him, that price understood those rights, that Price was satisfied with his counsel, and that—despite any factual disputes—Price persisted in pleading guilty" and where hearing transcript included defendant's confirmation "that he had consulted his counsel about how to proceed and that he had been 'extremely' satisfied with his counsel's representation").

To the extent movant means to argue that his plea was not knowing and voluntary because it was premised on counsel's misadvice regarding his sentence exposure, that claim also warrants no relief. Even if this Court were to accept as true movant's allegations that before he entered the second plea, defense counsel somehow led him to believe he would not face an enhanced sentence as an armed career criminal, it cannot be said that such representation was either coercive or that it unduly influenced movant's decision. First, an erroneous estimation of the guidelines does not entitle movant to relief in that "[a]n erroneous estimate by counsel as to the length of sentence" is not "necessarily indicative of ineffective assistance." *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981).[8] Even when an attorney erroneously estimates his client's potential sentence, the movant must satisfy the prejudice requirement of *Strickland* by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S.Ct. at 370; *United States v. Stumpf*, 827 F. 2d 1027, 1030 (5th Cir. 1987); *see also, United States v. Pease*, 240 F.3d 938, 940-42 (11th Cir. 2001) (rejecting argument by defendant sentenced as a career offender that her plea was not knowing and voluntary because he had relied on counsel's prediction that her potential sentence under the plea agreement would be anywhere from five to ten years); *Carranza v. United States*, 508 Fed.Appx. 873 (11th Cir. 2013); *United*

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8. The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

States v. Arvanitis, 902 F.2d 489, 494-95 (7th Cir. 1990) (no ineffective assistance where claim based only on inaccurate prediction of sentence).

The movant acknowledged during the second Rule 11 proceeding that, pursuant to the applicable statute, he was facing a 15-year minimum mandatory as an armed career criminal, and up to a maximum of life in prison. He also acknowledged that the court would consider the advisory guideline range, and that movant would be unable to withdraw his plea as a result of the sentence imposed. Movant indicated that he understood the possible sentence he could receive, denied being promised anything, other than as set forth in the newly modified written plea agreement, to induce him to change his plea, and denied being threatened or otherwise forced to plead guilty. The law is clear that a defendant's sworn representations, along with the representations of his lawyer and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 73-74. *See also United States v. Lemaster*, 403 F.3d 216, 221-222 (4th Cir. 2005) ("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 motion that necessarily relies on allegations that contradict the sworn statements.").

It bears noting that "[A]s a matter of public policy, no court should tolerate a claim of this kind, wherein the movant literally suggests in his §2255 filings that

he lied during the Rule 11 hearing," "[N]or should such a movant find succor in claiming" as movant does here, that "my lawyer told me to lie" or otherwise threatened/coerced him into doing so. *See Gaddis v. United States*, 2009 WL 1269234, *5 (S.D.Ga.2009) (unpublished). In his form §2255, in accordance with 28 U.S.C. §1746(1), movant declared "under penalty of perjury," that the claim(s) were true and correct. (Cv-DE#2:14). As noted previously in this Report, movant is now claiming in this proceeding that she was coerced to testify as she did during her change of plea proceeding before the district court. So, he was lying under oath at that time, or is lying under oath now. "[S]uch casual lying enables double-waivered, guilty-plea convicts to feel far too comfortable filing otherwise doomed §2255 motions that consume public resources." *See Irick v. United States*, 2009 WL 2992562 at *2 (S.D. Ga. Sept. 17, 2009). However, the Undersigned takes no position on whether the government should "consider investigating the movant for perjury." *See Irick v. United States, supra*; *see also*, *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (district court did not abuse its discretion by dismissing an action without prejudice where plaintiff "had lied under penalty of perjury about the existence of a prior lawsuit"), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

Here, movant has not shown a reasonable probability that he was coerced, forced, or otherwise unlawfully induced to enter his plea. To the contrary his allegations are directly refuted by the Rule 11 representations made by him under oath. Thus, he cannot now contend that his guilty plea was in reliance upon some alternative

characterization of his sentence exposure or advice given to him by his counsel. His self-serving statements that he was misadvised by counsel regarding his sentence exposure is wholly conclusory with no support whatever in the record, not to mention incredible.[9]

Further, even if we assume, without deciding, that before the plea proceeding it was in some way conveyed to movant that he was to receive a particular lesser sentence as he suggests here, movant's reliance on his attorney's erroneous prediction of a more lenient sentence is not sufficient to render a guilty plea involuntary. *See Stumpf*, 827 at 1030. *See also United States v. Harmon*, 139 F.3d 899 (5th Cir. 1998) (finding that the defendant could not "claim that his guilty plea was involuntary based upon his attorney's erroneous prediction about the length of the sentence"). As the Fifth Circuit explained in *Daniel v. Cockrell*, 283 F.3d 697 (5th Cir. 2002):

> A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that he would receive a lesser sentence. In other words, if the defendant's expectation of a lesser sentence did not result from a promise or

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9. *See generally United States v. Jones*, 614 F.2d 80, 81-82 (5th Cir. 1980) (district court justified in dismissing section 2255 movant's claims when movant presented only conclusory allegations to support claims). *See also Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that a petitioner is not entitled to habeas relief "when his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible'" (citation omitted)).

> guarantee by the court, the prosecutor or defense counsel, the guilty plea stands. Likewise, a guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed.

Daniel, 283 F.3d at 703.

It also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the movant. Because of the plea negotiated by defense counsel, movant benefitted from a three level reduction to his base offense level for acceptance of responsibility. Had he proceeded to trial and been found guilty, movant's exposure upon conviction may have been significantly greater. He also may not have been eligible for a reduction in his guideline range based on acceptance of responsibility. On the record before this court, movant has not demonstrated here that but for counsel's errors, he would not have pled guilty but would have gone to trial. *Hill*, 474 U.S. at 56-59. His suggestion at this juncture is wholly incredible and therefore rejected.

In conclusion, the record reveals that movant is not entitled to relief on any of the arguments presented as it is apparent from the extensive review of the record above that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v. United States*, 397 U.S. 742, 748

(1970).[10] See *also Hill v. Lockhart, supra; Strickland v. Washington, supra.* 466 U.S. 668 (1984). Further, as noted above, his enhanced sentence as a career criminal was proper. Therefore, no showing has been made that any further argument in this regard during the penalty phase of his case would have resulted in a different outcome, *i.e.*, a lower sentence.

Moreover, it bears noting that movant challenged the lawfulness of his enhanced sentence as an armed career criminal on appeal. *See United States v. Welch, supra*; (Cr-DE#69). The Eleventh Circuit affirmed the district court's finding, ruling in part pertinent that movant's prior robbery conviction qualified as a predicate offense for purposes of the enhancement. (*Id.*).

Consequently, the challenge of his sentence in this collateral proceeding, albeit expanding on the argument that his status as an armed criminal career criminal is unlawful, presented in the guise of an ineffective assistance of counsel, adds nothing of substance to

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10. It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

warrant reconsideration of the issue here. *See United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) ("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." (internal marks, citation and footnote omitted); *Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994) (*per curiam*)("[P]rior disposition of a ground of error on direct appeal, in most cases, precludes further review in a subsequent collateral proceeding.") *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981) (*per curiam*) ("This Court is not required on § 2255 motions to reconsider claims of error raised and disposed of on direct appeal."). Couching his claim in the guise of an ineffective-assistance-of-counsel claim in this §2255 proceeding adds nothing of substance which would justify a different result. *See Nyhuis*, 211 F.3d at 1343 (defendant was not entitled to collateral relief based on due process claim that was mere re-characterization of double jeopardy and immunity claim that was rejected on direct appeal) (citation omitted).

Stated differently, a claim rejected on direct appeal does not merit rehearing on a different legal theory. *Nyhuis*, 211 F.3d at 1343, *citing*, *Cook v. Lockhart*, 878 F.2d 220, 222 (8th Cir. 1989). Also, movant has failed to establish prejudice pursuant to *Strickland* arising from counsel's failure to pursue this argument at sentencing and/or on appeal. He is thus entitled to no relief on this claim.

Appendix F

B. Challenge to Armed Career Criminal Sentence

Alternatively, it appears movant argues a free standing claim that he is entitled to *vacatur* of his conviction and sentence based on the Supreme Court's recent decisions In *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Descamps v. United States*,[11] __ U.S. __, 133 S.Ct. 2276 (2013) on the basis that the district court, and not the jury, made factual determinations regarding movant's enhanced sentence. He suggests counsel should have anticipated these arguments. (Cv-DE#2; Cv-DE#7).

These decisions are the latest edition to the progeny of the Supreme Court's decision in *Apprendi v. New Jersey*,

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11. In *Descamps*, the defendant was convicted of possession of a firearm by a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA"), based in part on his prior burglary conviction under California law. *Descamps* involved application of the "residual clause" of the ACCA, §924(e)(2)(B)(ii), which defines "violent felony" as "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii). The California burglary statute did not include an element of the generic crime of burglary; it did not require that a burglar "enter or remain unlawfully in a building." The Supreme Court held that federal sentencing courts may not apply the "modified categorical approach" (meaning, consulting a limited class of documents, such indictments and jury instructions) to sentencing under ACCA's "residual clause" when the state crime of which the defendant was convicted has a single, indivisible set of elements (meaning, the statute did not contain alternative elements) *Descamps*, __ U.S. ___, 133 S.Ct. at 2281-82.

520 U.S. 466 (2010),[12] in which the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 520 U.S. at 490. Movant alleges that his guideline range was determined and drove his ultimate sentence upward based on facts which were neither charged in the indictment nor proved beyond a reasonable doubt by the jury at trial. Therefore, his sentence enhancement violated *Alleyne* and *Descamps*.

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12. The Eleventh Circuit has held that cases such as, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) are not retroactively applicable on collateral review. *See e.g., Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005), *cert. den'd*, 529 U.S. 1122, 120 S.Ct. 1992, 146 L.Ed.2d 817 (2005). The Eleventh Circuit has found that the decision in *Alleyne* is based on *Apprendi*, therefore, a defendant whose conviction became final long before *Apprendi* and *Alleyne* were decided, cannot now collaterally challenge his conviction based on his jury's failure to find drug quantity, because the holding in *Apprendi* does not apply retroactively. *Starks v. Warden, FCC Coleman-USP I*, 552 Fed.Appx. 869 (11th Cir. 2013) (unpublished). Other courts have similarly held that since *Apprendi* and its progeny have not been found retroactively applicable, thereby implying that the Supreme Court will not declare *Alleyne* to be retroactively applicable. *See Simpson v. United States*, 721 F.3d 875 (7th Cir. 2013); *Scott v. United States*, 2013 WL 4077546, *1 (S.D.Ga. 2013); *Ward v. United States*, 2013 WL 4079267, *2 (W.D.N.C. 2013). Unless the Supreme Court decides some time in the future that *Alleyne* applies retroactively on collateral review, movant cannot now collaterally challenge his convictions and sentences pursuant to *Alleyne*.

Appendix F

The Eleventh Circuit has determined that *Alleyne*, an extension of *Apprendi*, is not retroactively applicable to cases on collateral review. *See Jeanty, Jr. v. Warden, FCI-Miami*, __ F.3d __, 2014 WL 3411144 (11th Cir. July 15, 2014) (published) (*citing United States v. Harris*, 741 F.3d 1245, 1250 n.3 (11th Cir. 2014)); *see also, Starks v. FCC Coleman USP I*, __ F.3d __, 2013 WL 6670797 (11th Cir. 2013) (unpublished); *see also, Chester v. Warden*, __ Fed. Appx. __, 2014 WL 104150 (11th Cir. 2014) (unpublished) (*citing, Dohrmann v. United States*, 442 F.3d 1279, 1281-82 (11th Cir. 2006); *McCoy v. United States*, 266 F.3d 1245, 1256-58 (11th Cir. 2001) (holding that *Apprendi* is not retroactively applicable to cases on collateral review)).

Further, other courts who have considered the issue have also held that *Alleyne* has not been made retroactively applicable to cases on collateral review. *See In re Payne*, No. 13-5103, 2013 WL 5200425, at *1-*2. (10th Cir. Sept. 17, 2013) (agreeing with the Seventh Circuit that *Alleyne* is an extension of *Apprendi* and does not apply retroactively); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir. 2013) (holding that *Alleyne*, like *Apprendi*, was not made retroactive); *Frank v. United States*, Nos. CV 113-113, CR 103-045, 2013 WL 4679826, at *3 n. 1(S.D.Ga. Aug. 30, 2013) ("The Court is not aware of any authority indicating that *Alleyne* is retroactively applicable, and the case itself provides no such indication."); *Ward v. United States*, No. 1:02-cr-00063-MR-1, 2013 WL 4079267, at *2 (W.D.N.C. Aug. 13, 2013) (finding that petitioner's motion was untimely and §2255(f)(3) did not apply because the Supreme Court has not found that *Alleyne* is retroactive to cases on collateral review); *Luney v. Quintana*, No.

6:13-003-DCR, 2013 WL 3779172, at *3 (E.D.Ky. July 18, 2013) (noting that "there is no indication in ... *Alleyne*, that the Supreme Court made [that] holding retroactive to cases on collateral review.").

Like *Alleyne*, *Descamps*, an extension of *Apprendi* is also not retroactively applicable to cases on collateral review. The Supreme Court has also not declared *Descamps* to be retroactive to cases on collateral review. *Wilson v. Warden*, FCC Coleman, 2014 WL 4345685, *3 (11th Cir. Sept. 3, 2014); *Groves v. United States*, 755 F.3d 588, 593 (7th Cir. 2014); *Baker v. Chapa*, 2014 WL 4100712, *1 (5th Cir. Aug. 21, 2014). Nor has the Sixth Circuit so found. *Shelton v. United States*, 2014 WL 460868, *3 (E.D.Tenn. Feb. 5, 2014). Moreover, *Descamps* was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review. *Cf. In re Anderson*, 396 F.3d 1336, 1339 (11th Cir. 2005) (holding that *United States v. Booker*, 543 U.S. 220 (2005), was not retroactively applicable, in part, because the Supreme Court had decided it on direct appeal, and had not applied it to a case on collateral review).

Nevertheless, it bears noting that even if counsel was deficient for failing to request a downward departure at sentencing for the reasons set forth by the movant in this collateral proceeding, no showing has been made that the court would have granted a further variance, and imposed a lesser sentence. Movant has not met his burden of demonstrating that such an argument would have succeeded, much less that his sentence was unreasonable in light of the record before this court.

Appendix F

To the extent movant also argues that the court erred by enhancing his sentence as an ACCA based on facts not charged in the Indictment, found by a jury, nor admitted by him, that claim warrants no relief. In fact, the Eleventh Circuit has previously determined that "district courts may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved documents." *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013). Here, the court properly found movant qualified for an enhanced sentence as an armed career criminal. The enhanced penalty provision need not have been charged in the indictment nor proven beyond a reasonable doubt. *United States v. Weeks, supra.* Thus, no deficient performance or prejudice under *Strickland* has been established arising from counsel's failure to pursue this issue.

Moreover, both the Supreme Court and the Eleventh Circuit have held that "[A] sentence must be both procedurally and substantively reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007) ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence...."); *United States v. Ellisor*, 522 F.3d 1255, 1273 (11th Cir. 2008). A sentence will only be reversed as substantively unreasonable upon a "definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors." *United States v. McGarity*, 669 F.3d 1218, 1264 (11th Cir.) (internal quotation marks omitted),

cert. den'd, McGarity v. United States, __ U.S. __, 133 S.Ct. 378, 184 L.Ed.2d 220 (2012). The party challenging the sentence bears the burden of proof. *Id.*

The record confirms that the court not only considered defense counsel's arguments against the enhanced sentence, but also considered the advisory guidelines, along with the §3553 statutory factors. The movant was sentenced to the statutory minimum mandatory term of 15 years in prison. It is evident from the record that the district court properly applied 18 U.S.C. §3553 to the facts of this case and imposed a substantively reasonable sentence. Moreover, the fact that movant's sentence is far below the maximum term of life imprisonment, is also a strong indication of substantive reasonableness. *See United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008) (holding that a sentence was substantively reasonable, in part because it was "well below the maximum ten-year sentence"). Movant has not demonstrated that counsel was deficient, much less that he was prejudiced under *Strickland* based on counsel's failure to pursue this nonmeritorious issue. *Strickland v. Washington, supra.*

In conclusion, the record reveals that movant is not entitled to relief on any of the claims presented in this motion to vacate proceeding as it is apparent from the extensive review of the record that the claims warrant no relief, and more particularly, that movant's guilty plea was entered freely, voluntarily and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by him. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brady v.*

United States, 397 U.S. 742, 748 (1970).[13] *See also Hill v. Lockhart, supra; Strickland v. Washington, supra.* 466 U.S. 668 (1984).

VI. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on his claim, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. *See Higgs v. United States*, 711 F.Supp.2d 479, 552 (D.Md. 2010) (*citing Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled on other grounds by* 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992)). Further, a hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989), *citing, Guerra v. United States*, 588 F.2d 519, 520-21 (5th Cir. 1979). As discussed in this Report, the arguments

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13. It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

raised are unsupported by the record or without merit. No evidentiary hearing is required.

VII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." *See* Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. *See* 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §2253 (c) (2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001).

Appendix F

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. *See Slack*, 529 U.S. at 485; *Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Conclusion

It is therefore recommended that this motion to vacate be denied on the merits, that any pending motions not otherwise ruled upon be denied as moot, that a certificate of appealability be denied; and, the case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 29th day of September, 2014.

/s/
UNITED STATES MAGISTRATE JUDGE

APPENDIX G — REPLY IN SUPPORT OF 2255 PETITION, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED APRIL 10, 2014

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 13-62770-CIC-MARRA
(09-60212-CR-MARRA)

GREGORY WELCH,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S RESPONSE TO THE GOVERNMENT'S RESPONSE

Comes now, petitioner states that he is a layman of the Law, unskilled in the Law, and therefore request that this response be construed liberally. *Haines v. Kerner*, 404 U.S. 519 (1972).

PETITIONER STATES THE FOLLOWING IN THIS RESPONSE:

(1). Petitioner was charged with a Title 18 U.S.C. Section 922(g)(1), not a Title 18 U.S.C. Section 924(e).

Therefore, the state priors used to enhance the petitioner were improperly used because petitioner was never given a fair opportunity to defend himself against the Florida State priors of Docket Numbers 1996-CF-005680 (Robbery Conviction); Docket 1996-CF-001575 (Robbery Conviction); and Docket 2003-CF-17694 (Battery). It was never determined whether these Florida state priors violated *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575 (1990); or *Descamps v. United States*, 133 S.Ct. 2276 (2013), non-generic indivisible elements concerning all three Florida state priors that in fact, violate *Shepard*, *Taylor*, *Descamps*, and *Johnson v. United States*, 130 S.Ct. 1265 (2010); and *Begay v. United States*, 128 S.Ct. 1581 (2008). Plus petitioner pled guilty to lesser offenses in all three state priors, then he was enhanced for. In other words Movant was enhanced for the arresting state priors, but not based on the lesser offenses in which he pled guilty to, *Day v. United States*, 465 F.3d 1265 (2206 11th Cir.) The Armed Career Offender status was therefore, inapplicable and inadequate from the very start. Because Movant was enhanced based on Fifth Amendment rights to improper notice of the state priors, petitioner was never given the opportunity to verify under *Descamps*, *Shepard*, and *Taylor*.

Now in regards to the legal state documentation of these state priors, Movant was enhanced based on non-judicial documentation that was not certified from the county from where the state priors originated at. There were no state transcripts, no state plea agreements, no Shepard material as legal verification of these state priors, no modified categorical approach, no indivisible

element requirements in regards to *Descamps*. Movant was enhanced based on what he supposedly did, not to what he pled guilty in the state for, concerning these state of Florida priors. Thereby, violating the petitioner's Fifth Amendment rights to proper *Shepard*, *Taylor*, and *Descamps*, requirements. Petitioner's Sixth Amendment rights were violated to effective assistance of counsel, because petitioner was prejudiced by these improper, and unconstitutional enhancements that caused petitioner 15 years unconstitutionally in a Federal prison, based on counsel's ineffectiveness, and below standard of representation. *Strickland v. Washington*, 466 U.S. 668-687 (1984); *Cronic v. United States*, 466 U.S. 648 (1984); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Padilla v. Kentucky*, 130 S.Ct. 1476 (2010); *Schlup v. Delo*, 513 U.S. 298 (1995); *Hill v. Lockhart*, 474 U.S. 48-52 (1985); *Davis v. United States*, 417 U.S. 333-340 (1994). But for counsel's ineffectiveness and below the standard of representation, the proceedings would have been so much different.

Petitioner's Eighth Amendment rights were violated because it was cruel and unusual punishment to sentence the Movant to 15 years, or involuntarily, unintelligently, or unknowingly plead Movant out based on invalid, non-certified state priors that he was not indicted for, and that he was not given an opportunity to prepare a sufficient and adequate defense against. And priors that were in violation of *Taylor*, *Shepard*, and *Descamps*, *supra*, and petitioner's Fifth, Sixth, and Eighth Amendment rights under the United States Constitution. A presentence report is not evidence, and whether Movant objects to it as not being

evidence, or not, the Court still uses and used it against the Movant anyway in violation of *Shepard*, *Taylor*, and *Descamps*, *supra*, requirements.

(2). It was the government that improperly, along with the probation office that finally determined unconstitutionally that Movant should be declared a Armed Career Offender, when it should have been by and through indictment process. In other words the probation office, and the government with the Court's permission, held it's own trial against the Movant based on state priors that were inadequate, insufficient, and improper, because they were in violation of *Shepard*, *Taylor*, and *Descamps*, and the Movant's Fifth, Sixth, and Eighth Amendment rights. The probation office, the government and the Court held it's own trial on it's own terms and declared the Movant a Armed Career Offender in violation of all of the above stated reasons.

(3). Movant was never made aware that he was being declared a Armed Career Offender in his first plea agreement at all, or that he was going to be sentenced as one. When he took his plea on June 18, 2010, but when he was sentenced on September 17, 2010, he was suddenly given a second plea agreement which enhanced him to Armed Career Offender status in violation of all the above already stated reasons. Thereby, making the plea involuntary, unintelligent, and unknowing. Movant was told that he could receive no more than 10 years on the first plea agreement, it was his only reason for pleading guilty period. *Padill*, *Hill v. Lockhart*, *Missouri v. Fry*, *Lafler v. Cooper*, *supras*. Movant's plea is improper, it violates

the Movant's Fifth, Sixth, and Eighth Amendment rights. It's involuntary, unintelligent, and unknowingly! Had Movant known on the day of September 17, 2010, he was going to receive a different plea right before sentencing, he would have proceeded to trial and proved his innocence in a Court of Law. Counsel should have objected to the second plea agreement, but instead he ineffectively remained silent, allowing the Movant's Fifth, Sixth, and Eighth Amendment rights to be violated to a involuntary, unintelligent, and unknowing plea agreement that violated the Statutes, Laws and Constitution of the United States. Instead of protecting the Movant's constitutional, statutes, and Rule 11, plea rights, counsel allowed them to be waived away by simply remaining silent, and never saying a word to protect his client's rights.

(4). How is the evidence clear of a second plea agreement, when in fact, the Court allowed the government to introduce a second plea agreement on the very day Movant was being sentenced on September 17, 2010. If that's not abuse of discretion, or judicial misconduct, or prosecutor misconduct, or ineffective assistance of counsel in violation of the Movant's Fifth, Sixth, and Eighth Amendment rights, what else could this possibly be. All Movant is requesting is for the Court to allow him to withdraw his involuntary, unintelligent, and unknowing plea, and proceed to trial and prove his innocence in a Court of Law, before a jury of twelve.

The judge stated that Movant was only to receive 10 years at most on a plea transcript by Law, and that Movant could receive no more than ten years at most.

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See plea transcript page 18, Line 5-19 and Page 19, Line 13-25, dated 6/18/2010. Prior to this plea agreement the U.S. Attorney's Office had stipulated that they were going to enhance Movant, but it was all within the contents of the no more than the 10 year plea. However, on the day of sentencing September 17, 2010, the government violated *Santobello v. New York*, 404 U.S. 257 (1974), by introducing a totally new plea agreement for which Movant never had any time nor opportunity to prepare a defense against. Thereby, violating the originally stated plea agreement of June 18, 2010.

Counsel's silence and neglect to speak up for the Movant prejudiced the Movant and caused him 15 years unconstitutionally, in a Federal prison, in violation of *Padilla*, *Lafler*, *Frye*, *Hill v. Lockhart*, *Santobello*, and *Cronic*, *supras*.

(5). Movant's plea was not a voluntary plea, nor a intelligent plea, and definitely not a knowingly plea, based on all of the above stated reasons. Had Movant known he was going to be tricked, schemed, or mislead into a involuntary second plea agreement, he would have proceeded directly to trial. Obviously Movant was mislead, ill-advised, and tricked into a second unwanted involuntary plea on the day of sentencing, based on a agreement in the first plea that counsel and government had already agreed with. Thereby, violating *Santobello v. New York*, in the second involuntary plea, on the day of sentencing. Movant's plea was therefore, as he continues to state, involuntary, unintelligent, and unknowingly.

Appendix G

Movant was verbally forced into a unwanted second plea agreement directly on the day of sentencing by a counsel that would not even speak up for him and or represent him as a counsel guaranteed to him by the Sixth Amendment of the United States Constitution. And as the Honorable Court should be made aware, the government presents a second and new plea agreement to counsel and Movant on the day of sentencing with counsel not speaking up for the Movant and representing the Movant according to a counsel of the Sixth Amendment of the United States Constitution.

(6). Movant has already verified to the Court how the second plea was inaccurate and insufficient, and how Movant could not even prepare a defense against it on the exact day of sentencing. See all of the above stated reasons as to why that a second plea was inaccurate and inadequate, and why counsel was so ineffective, and why that second plea was so gross and defective. And why Movant is screaming loudly ineffective assistance of counsel and involuntary unintelligent, and unknowing plea, and why Movant was incorrectly declared a Armed Career Offender in violation of *Santobello v. New York*; *Hill v. Lockhart*; *Padilla v. Kentucky*, *Missouri v. Frye*, *Lafler v. Cooper*; *Descamps*, *Taylor*, *Shepard*, *Strickland*, and *Cronic*; and *United States v. Al-Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008). Movant was involuntarily forced into the second plea unknowingly on the day of sentencing, by a misleading counsel with verbal coercion. See Movant's original first Section 2255 Motion Memorandum of Law.

(7). The government says that Descamps, is not retroactive. Not only is Descamps, a substantial change in the Law, made retroactive by the Supreme Court, but it also relates back to the Movant's issues and claims concerning non-generic indivisible elements in regards to all three of the Movant's state priors used to improperly and unconstitutionally enhance the Movant to Armed Career Offender status in violation of *Descamps*, *Begay v. United States*, 128 S.Ct. 1581 (2008); *Johnson v. United States*, 130 S.Ct. 1265 (2010). Movant's *Descamps*, claim is retroactively applicable to this Section 2255 Motion. Movant's Descamps claim was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. And therefore, should be addressed by this Court. See also, *United States v. Ramirez-Flores*, 2014 WL 667357, * 2 (11th Cir. February 21, 2014) and *United States v. Contreras*, 739 F.3d 592, 594 (11th Cir. 2014) and *Untied States v. Morris*, 516 Fed. Appx. 882 (Apr. 16, 2013), in regards to Eleventh Circuit precedence in *Morris*, in regards to *Descamps*, *supra*.

(8). *Morris*, tells us loud and clear, that a Court other than the Supreme Court may determine retroactively under Section 2255 and 2255(f)(3) and stated that in deciding retroactively we apply the Teague rubric *id.* at 883 (citation omitted). Movant also reaffirms and reasserts his Descamps, claims in his Section 2255 Motion as being a substantial change in the Law, and retroactively applicable to his case.

(9). Movant has proven and verified to the Honorable Court that he is in fact entitled to a Evidentiary Hearing

in this case, based on all of the above stated facts in this response. Movant has set forth those specific facts that support his claims in his Section 2255 Motion, and in this response by the evidence in this response and in his Section 2255 Memorandum of Law. Movant's above stated claims and issues entitle him to a Evidentiary Hearing on his involuntarily, unintelligently, and unknowing plea, and improper and unconstitutional Armed Career Offender status that is in violation of all of the above stated reasons. Movant is therefore, entitled to relief.

CONCLUSION

Movant requests a Evidentiary Hearing, based on all of the above stated facts and reasons. Movant swears under the penalty of perjury that all of the information in this response is true and correct to the best of his knowledge 28 U.S.C. 1746. And counsel refused to submit a affidavit in opposition to the Movant's truthful facts, and honest statements in his Section 2255 Motion and response.

Respectfully Submitted,

/s/_____
Gregory Welch
73675-004
FCC-Coleman-Medium
P.O. Box 1032
Coleman, FL 33521-1032

4/6/14
Dated

APPENDIX H — MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED DECEMBER 20, 2013

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Docket or Case No.. 09-cr-60212-KAM

Name (under which you were convicted):
GREGORY WELCH

Place of Confinement:
FCC-COLEMAN-MEDIUM

Prisoner No: 73675-004

UNITED STATES OF AMEIRCA

v.

GREGORY WELCH

Movant

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

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U.S. District Court, Southern District of Florida, West Palm Beach Division, West Palm Beach, Florida 33401

(b) Criminal docket or case number (if you know): 09-cr-60212-KAM

2. (a) Date of the judgment of conviction (if you know): 08/17/2010

   (b) Date of sentencing: 8/17/2010

3. Length of sentence: 180 months

4. Nature of crime (all counts): Title 18 U.S.C. Section 922(g)(1)

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☒
   (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☒

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

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8. Did you appeal from the judgment of conviction?
Yes ☐ No ☒

9. If you did appeal, answer the following : N/A
(a) Name of court: N/A
(b) Docket or case number (if you know): N/A
(c) Result: N/A
(d) Date of result (if you know): N/A
(e) Citation to the case (if you know): N/A
(f) Grounds raised: N/A
(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐
If "yes," answer the following:
(1) Docket or case number (if you know): Unknown
(2) Result: Affirmed
(3) Date of result (if you know): 1/07/2013
(4) Citation to the case (if you know): Unknown
(5) Grounds raised: That Petitioner was not an armed career offender, and was not charged by indictment as being one, based on the state priors that were used against him.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court? Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:
(a)(1) Name of court: N/A
(2) Docket or case number (if you know): N/A

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(3) Date of filing (if you know): N/A
(4) Nature of the proceeding: N/A
(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?
Yes ☐ No ☒
(7) Result: N/A
(8) Date of result (if you know): N/A

(b) If you filed any second motion, petition, or application, give the same information: N/A
(1) Name of court: N/A
(2) Docket or case number (if you know): N/A
(3) Date of filing (if you know): N/A
(4) Nature of the proceeding: N/A
(5) Grounds raised: N/A
(6) Did you receive a hearing where evidence was given on your motion, petition, or application?
Yes ☐ No ☒
(7) Result: N/A
(8) Date of result (if you know): N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?
(1) First petition: Yes ☐ No ☒
(2) Second petitition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: Counsel was ineffective for not doing so.

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the *facts* supporting each ground.

GROUND ONE: Counsel was ineffective for allowing the Petitioner to be unconstitutionally sentenced as an armed career offender.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Petitioner was charged with simple possession of a firearm and ammunition. Upon pleading guilty, he was enhanced unconstitutionally to armed career offender status, in violation of his Fifth, Sixth, and Eighth Amendment rights. Thereby, making the plea involuntary.

(b) Direct Appeal of Ground One:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: Counsel was ineffective for not doing so.

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A

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Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A
Docket or case number (if you know)? N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available:) N/A
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND TWO: See Attached Memorandum of Law.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): N/A

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(b) Direct Appeal of Ground Two:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if your know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A

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Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: See Attached Memorandum of Law

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Attached Memorandum of Law.

(b) Direct Appeal of Ground Three:
(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes ☐ No ☒
(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes,: state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: See Attached Memorandum of Law

(a) Supporting facts (do not argue or cite law. Just state the specific facts that support your claim.):
See Attached Memorandum of Law.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes ☐ No ☒
(2) If your answer to Question (c)(1) is "Yes," state: N/A
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☒
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☒
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☒
(6) If your answer to Question (c)(4) is "Yes," state: N/A
Name and location of the court where the appeal was filed: N/A
Docket or case number (if you know): N/A
Date of the court's decision: N/A
Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have *not* previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: N/A

14. Do you have any motion, petition, or appeal *now pending* (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
Peter V. Birch
Attorney-At-Law
450 Australian Avenue
Suite 500
West Palm Beach, Florida 33401

(a) At preliminary hearing: Same

(b) At arraignment and plea: Same

(c) At trial: Same

(d) At sentencing: Same

(e) On appeal: [illegible]

(f) In any post-conviction proceeding: Pro-se

(g) On appeal from any ruling against you in a post-conviction proceeding: Pro-se

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒
(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A
(b) Give the date the other sentence was imposed: N/A
(c) Give the length of the other sentence: N/A
(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

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18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Therefore, movant asks that the Court grant the following relief: Petitioner request re-sentencing and not as an armed career offender, and withdrawal of his involuntary plea.

or any other relief to which movant may be entitled.

_____

Signature of Attorney (if any)

---

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.:
09-60212-CR-MARRA

TITLE 28 U.S.C. 2255
MOTION/PETITION/ MEMORANDUM OF LAW

TABLES INTENTIONALLY OMITTED

JURISDICTION

The Honorable Court has jurisdiction to hear this case, based on Title 28 U.S.C. Section 2255, and Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On 3/19/2009, Petitioner was charged with possession of a weapon and ammunition, according to Title 18 U.S.C. Section 922(g)(1). Petitioner pled guilty to 0-10 years at most. Several days before the Petitioner was to be sentenced, he received a different plea agreement from counsel, involuntarily forcing him to plead out to a 15 year sentence. Petitioner based on duress, coercion, and verbal manipulation from counsel was forced into a 15 year plea, because counsel told Petitioner, he had to take the second plea, regardless of the fact that Petitioner did not want to accept it. Therefore, forcing the petitioner into an involuntary, unintelligent, and unknowing coerced verbal unwanted plea.

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STATEMENT OF THE FACTS

Petitioner was never charged, nor indicted for Title 18 U.S.C. Section 924(g)(1), yet he was enhanced, and labeled an armed career offender, based on state priors that were invalid , inadequate and did not meet the requirements of Petitioner's Fifth and Sixth Amendment rights to be enhanced to armed career offender status, nor were these state priors stated in either of the plea agreements. Thereby, violating the Petitioner's Fifth Amendment right to prepare a defense for these unconstitutional and invalid state priors, that were never listed, and that were inadequately, and invalidly used to unconstitutionally enhance the Petitioner.

Petitioner's plea is therefore, invalid, unconstitutional, involuntary, unintelligent, and unknowingly.

ARGUMENT ONE

Petitioner's Plea Was Involuntary, Unintelligent, And Unknowingly, Based On Counsel's Ineffectiveness

(1). Petitioner's first plea agreement was based on a 0-10 year sentence. However, several months later, Petitioner received a plea for 15 years to life. This is after the Petitioner had given up all of his appeal rights, all of his constitutional rights, and all of his Federal rights. Had Petitioner known, he was going to be declared as an armed career offender, he would have never pled guilty at all, but would have instead, proceeded directly to trial, and proved his innocence in a Court of law.

(2). Counsel had come to an agreement under *Santobello v. New York*, 404 U.S. 257 (1974), with an agreement with the Government for a plea, of 0-10 years, Petitioner had been debriefed, he had proffered, with the Government, and taken full responsibility within the debriefing and proffer, yet on a second plea agreement, sentenced to 15 years in a Federal United States prison, in violation of *Santobello*, *supra*, in violation of his due process to a *Santobello* plea, in violation of his Fifth Amendment right to not be violated of his constitutional rights, his Federal rights, and statutory rights, after he had already pled guilty and waived all of these rights in the first plea, and been *debriefed*, and *proffered*, and then used the very information against the Petitioner that he proffered too, and that he was debriefed on. Thereby, violating the Petitioner's Fifth Amendment right to due process, and equal process of the law, and Petitioner's Sixth Amendment rights to effective assistance of counsel. Had Petitioner known that his debriefing and proffer sessions would be used against him, he would have never pled guilty, but would have instead proceeded directly to trial and proved his innocence in a Court of law, before a just of twelve (12). Had Petitioner known he would be declared an armed career offender, and was not charged as one in his indictment, he would have proceeded directly to trial and proved that he was not an armed career offender, and proved his total innocence in this case in total before a jury of twelve (12). Had Petitioner known that the Government and counsel would renege on the first plea agreement after proffering and debriefing, he would have instead proceeded directly to trial and none of this information could have been use against him.

Had Petitioner known that counsel was misleading him, ill-advising him, and scheming and tricking him into an involuntary, unintelligent and unknowing plea with the Government by all of the stated information in this claim, he would have proceeded directly to trial and proved his innocence in a Court of law.

(3). Petitioner for the first time was told in the second plea agreement that he was potentially being considered as an armed career offender, not that he was one. Had Petitioner known this in advance, he would have never pled guilty and would have challenged his armed career offender status.

(4). Had Petitioner known of counsel's ineffectiveness, he would have requested different counsel other than the ineffective counsel he had.

(5). Petitioner informed counsel that he did not want to take nor accept the second plea agreement, but counsel verbally forced the Petitioner through coercion verbally into accepting the second plea agreement, by telling the Petitioner that he had to accept the second plea agreement. This is after the Petitioner had proffered and debriefed against himself.

(6). In Petitioner's first plea agreement, of June 18, 2010, on Page 19 and Page 20, Line 1-9, petitioner was promised no more than 0-10 years at most. Had Petitioner known he would receive more than the 0-10 years, he would have never pled guilty, but would have instead proceeded directly to trial.

(7). Had Petitioner known that counsel was not going to file the proper objections to his first plea agreement, he would have never pled guilty at all. Because counsel only filed supplemental objections to the enhancements for which Petitioner received, and never objected to the second plea agreement and violations of *Santobello* in it, because Petitioner received and was forced by counsel to plead to an even harsher, and draconian plea agreement in violation of *Santobello*, based on an already agreed upon plea agreement, for more time, that was now breached by the Government and counsel's verbal coercion into forcing the Petitioner into this plea agreement under duress and stress by an ineffective counsel that represented the Petitioner below standards Especially when the Judge in the first plea agreement blatantly stated that Petitioner could receive no more than 0-10 years at most in the first plea agreement.

(8). Had Petitioner known that he would be enhanced for a robbery that did not meet armed career offender requirements, he would have never pled guilty. Petitioner's Florida State prior, CF-96-5680CF10, robbery offense violates *Begay v. United States*, 128 S. t. 1581 (2008); *United States v. Canty*, 570 F.3d 1251 (2010). Petitioner's robbery under Florida State Statute Section 812.13(1) and 812.13(2)(C). (C-6), is ambiguous, vague, and was without any violence and or physical force. It also violates *Descamps v. United States*, U.S. Supreme Court Cite 11-9540.

(9). Petitioner's State of Florida prior for Docket Case No.: 03-17694CF10, battery, Florida State Statute

Section 784.041, Petitioner served 364 days, which was less than a year. Petitioner never pled to any violence, in this case, nor did he ever admit to the crime. Thereby, being improperly used against the Petitioner for an armed career predicate. Petitioner never admitted to any violence aggressive conduct, nor intentional violence in this case. *Begay v. United States*, 128 S. Ct. 1581 (2008); *Johnson v. United States*, 130 S. Ct. 1265 (2010); and *United States v. Skyes*, 131 S. Ct. 2275-76 (2010).

(10). This State of Florida prior therefore, was invalidly used for an armed career offender predicate. Because it does not meet armed career offender status.

(11). Case No.: Docket 961575CF(B), this was a strong arm robbery case, for which the Petitioner, never pled to any violence, and force, nor aggressive conduct. Nor did the Court have the proper state documentation in which to pursue an armed career offender sentence against the Petitioner with this predicate because there was no *Shepard v. United States*, 544 U.S. 17, 26 (2005); *Taylor v. United States*, 495 U.S. 575; nor *Descamps*, material to use in order to arm career the Petitioner, for this predicate nor of the other state predicate mentioned aboved.

(12). Had the Petitioner known that the Court was going to use even this robbery from the State of Florida, Docket No.: 96-1573CF13, which has multimeanings, he would never have pled guilty.

(13). Petitioner objected to Docket No.. 2003-cf-17694 and 1996-cf-005680, they were objected to as being not

crimes of violence. They should never have been used as predicates.

(14). Had Petitioner known that these state priors were going to be used to arm career him, he would have never pled guilty and would have instead proceeded directly to trial. But for counsel's ineffectiveness the proceedings would have been so much different because a presentence report is not evidence, nor is valid documentation which violates *Shepard*, *Taylor*, and *Descamps*, *supras*. Police Reports, booking sheets are all improper such as on this case, because there was no state transcripts, state plea agreements, nor state colloquy to verify Petitioner's state priors as being valid and or proper. Plus Petitioner objected to the use of the presentence report. Petitioner's pleas is therefore, involuntary, unintelligent, and unknowingly. See *Shepard*, *Descamps*, *Taylor*, *Lafler*, *Frye*, *Hill v. Lockhart*, 474 U.S. 52 (1985); and *Padilla v. Kentucky*, 130 S. Ct. 1476 (2010); and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), for Petitioner's first state prior.

(15). Counsel prejudiced the Petitioner in this case, for coercing him verbally into a change of plea, knowing that Petitioner did not want to change his plea, and told counsel that he did not. Counsel's prejudice caused the Petitioner to be armed careered and sentenced to 15 years rather than the 0-10 years that the Petitioner had first been promised by the Government and counsel. But for counsel's ineffectiveness, the proceedings would have been so much different. *Strickland v. Washington*, 466 U.S. 668-687 (1984); *Cronic v. United States*, 466 U.S. 648; *Padilla*, *Lockhart*, *Lafler*, and *Frye*, and *United States v. Al Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008).

(16). Petitioner states to the Honorable Court that during the rare II plea colloquy, the Judge stated that he could not sentence Petitioner to no more than 0-10 years. At Petitioner's first bond hearing the Government stated it was seeking to enhance the Petitioner on his state priors, and Petitioner was denied bond, because of these state priors. Counsel was therefore, ineffective for coercing the Petitioner into withdrawing his first initial plea, based on the fact that the Government already had sufficient evidence to enhance Petitioner in the first plea agreement.

(17). Counsel was also ineffective in this case, because had Petitioner proceeded to trial, he would have scored out only to Base Offense Level 17, Category VI, which is 51-63 months. Therefore, had Petitioner proceeded to trial he would have received a significantly lesser sentence, than the draconcian 15 years, that he was involuntarily coerced into in the second plea agreement for which violated Petitioner's first plea agreement. *United States v. Al Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008). But for counsel's ineffectiveness, the proceedings would have been so much different. Counsel's ineffectiveness prejudiced the Petitioner, based on all of the aboved stated reasons, and caused him 15 years in a Federal prison, unintelligently, unknowingly, and involuntarily. *Lafler*, *Frye*, *Hill v. Lockhart*, 474 U.S. 52 (1985); *Davis v. United States*, 417 U.S. 333-346; *Hill v. United States*, 368 U.S. 424-429 (1962); *Schlup v. Delo*, 513 U.S. 298 (1995); *Strickland*, *Cronic*, and *Padilla*, *supras*.

Petitioner request remand of his unintelligent, unknowing, and involuntary plea.

Appendix H

CONCLUSION

Petitioner request that his plea be declared involuntary, unintelligent, and unknowingly, based on all of the aboved stated facts.

December 9, 2013
Dated

Respectfully Submitted,

/s/_____
Gregory Welch
#73675-004
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33521-1032

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 13, 2012

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-14649

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GREGORY WELCH,

Defendant - Appellant.

June 13, 2012, Decided
June 13, 2012, Filed

Appeal from the United States District Court
for the Southern District of Florida.

Before DUBINA, Chief Judge, FAY, and KLEINFELD,* Circuit Judges.

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* The Honorable Andrew J. Kleinfeld, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix I

KLEINFELD, Senior Circuit Judge:

We address whether consent to a search was voluntary and whether it was "fruit of the poisonous tree." We also address whether a Florida conviction for robbery is a "violent felony" under the Armed Career Criminal Act.

Facts

Broward County sheriff's deputies had probable cause to believe that a John Jacobs had robbed a convenience store. Two people had been shot during the robbery. The deputy sheriffs learned that Jacobs lived with his mother in an apartment complex behind the store, and "frequented" two other apartments there, Gregory Welch's being one of them. Two days after the robbery, thirteen officers went to the three apartments looking for Jacobs. They had not obtained search or arrest warrants. The plan was to have groups of three officers knock simultaneously on the doors and ask whomever was there whether they had seen Jacobs. The police knew what Jacobs looked like, because one of the robbery victims had identified him from a photograph.

Someone other than Jacobs answered the door at Welch's apartment. The three officers at the door asked him if anyone else was there, and he said there was, but would not say who. The police entered and did a "limited protected sweep" to see if anyone inside posed a threat to them. Welch was in a bedroom on the bed talking on a cell phone, smoking a "joint," and minding a baby. The police had drawn their guns before entering the apartment, but holstered them when they saw Welch on the bed.

The police took Welch out onto the balcony. They heard on the police radio that Jacobs had been arrested, so now they were looking only for his gun. They asked Welch if they could search his apartment. He refused. When the police told him they would then have to get a search warrant, which "would take a while," he consented orally and signed a written consent form. It was "four or five minutes, if that" from when the police entered the apartment to when they asked for consent, and another "several" minutes between oral and written consent. The police then searched the apartment, and found Welch's pistol (which was not the gun Jacobs had used in the robbery) and ammunition in "an attic space." After the police found the pistol and cartridges, they put Welch in their van, in the passenger seat and without handcuffs, and he admitted that the pistol and ammunition were his.

Though Welch testified otherwise, the district court found that: (1) the police did not search the apartment until Welch gave his written consent; (2) the police did not threaten to ransack the apartment if he refused consent; (3) the police did not threaten to have the Department of Children and Families take Welch's children away if he refused consent; and (4) the consent form was read and explained to Welch. The district court found that Welch was not intimidated into consenting by the police, as was shown by his initial refusal as well as the plain advice of rights in the form. Rather, the court found, Welch consented because he was not going to be allowed back into the apartment to somehow dispose of the handgun and ammunition, so it made sense for him to agree to the search and hope the police would not find his hiding place.

The district court denied Welch's motion to suppress the pistol and his statements in the police car. The court held that the initial "protective sweep" was unlawful, because the police were not lawfully in the apartment. They entered to do the sweep, instead of doing the sweep because they had lawfully entered and needed to protect themselves after doing so. The question, as the court saw it, was whether the consent to search was voluntary, and whether the discovery of the pistol and Welch's admission were "tainted" by the unlawful entry that led to them. The court held that the consent was voluntary, and that the consent and admission were not tainted.

Welch pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), reserving the right to appeal the denial of his motion to suppress. The presentence report categorized Welch as an armed career criminal because of three prior violent felony convictions, and concluded that the Armed Career Criminal Act required that he be sentenced to a minimum of fifteen years in prison because of these prior convictions.[1] That sentence was imposed, subject to Welch's reservation of the right to challenge it. Only one of the predicate offenses is challenged in this appeal, a 1996 conviction for Florida strong arm robbery.

1. 18 U.S.C. § 924(e)

Appendix I

Analysis

A. The Motion to Suppress

Welch argues that the pistol and ammunition should be suppressed because they were found in an unlawful search, and that his subsequent statements made while he was sitting in the passenger seat of the police car should be suppressed because the putatively unlawful sweep brought them about. The government argues that the initial entry into the apartment was not unlawful, though the district court concluded that it was. We need not decide this question. Even if the sweep was unlawful, the government could avoid suppression if it showed that Welch's consent to the search was voluntary, and that it was not tainted by the unlawful sweep.[2] We, like the district court, so conclude.

Denial of a motion to suppress is a mixed question of law and fact.[3] The district court's findings of fact control unless they are clearly erroneous, but its interpretation and application of law are reviewed de novo.[4]

The first question we address is whether Welch's consent and admissions were "fruit of the poisonous tree," the "poisonous tree" being the putatively unlawful sweep.

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2. *United States v. Delancy*, 502 F.3d 1297, 1308 (11th Cir. 2007).

3. *Id.* at 1304.

4. *Id.*

It is undisputed that the officers who entered Welch's room did so with their guns drawn, but holstered them when they saw that Welch was unarmed. And it is undisputed that Welch consented to the search, first orally and then in writing, within a few minutes of being escorted onto his balcony. Most importantly, it is undisputed that Welch initially refused to consent.

Two precedents control our analysis, *United States v. Santa*[5] and *United States v. States v. Delancy.*[6] In both cases, we considered three factors that gave us a "useful structure" to determine whether a defendant's consent was tainted by illegal police actions: the time elapsed between the illegal act and the search, any intervening circumstances, and the purpose and flagrancy of the unlawful government conduct.[7] In *Santa*, the consent, even if voluntary, "did not purge the primary taint of the illegal entry and arrest.[8] The suspect was still on the floor, handcuffed, three minutes after the DEA had broken down his door and burst into his apartment, when he told them where they could find the drugs. The search and discovery of the evidence were all over by the time he signed the consent form.[9] *Santa* is of no help to Welch, because Welch was standing on the balcony, not

5. *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000).

6. *United States v. Delancy*, 502 F.3d 1297 (11th Cir. 2007).

7. *Id.* at 1309-10.

8. *Santa*, 236 F.3d at 677.

9. *Id.* at 677-78.

handcuffed, when he consented, and he initially refused to consent. No search occurred until he changed his mind. It is one thing to consent to a police request while flat on one's face on the floor and handcuffed, quite another when chatting without any physically forcible coercion after having left the scene of the police intrusion.

This distinction bears on the difference between *Santa* and *Delancy*. *Delancy* assumes, as we do, that the protective sweep was unlawful, but, as in this case, the district court found that the sweep was for the protection of the officers, not a subterfuge to intimidate and question the appellant.[10] Had the entry "been made for the purpose of gaining consent," then the consent would be tainted, because attenuation analysis is unnecessary "when the police act with the express purpose of exploiting an illegal action."[11] That is the central principle of a search that is unconstitutional as "fruit of the poisonous tree" despite voluntary consent.[12] And once inside, albeit unlawfully, the officers neither in *Delancy* nor here acted "flagrantly" by "tear[ing] the house apart."[13] There and here, "timing is not the most important factor."[14] We decide whether consent was tainted by illegality with "a pragmatic

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10. *Delancy*, 502 F.3d at 1312.

11. *Id.*

12. *See Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963).

13. *Delancy*, 502 F.3d at 1313.

14. *Id.* at 1311.

evaluation of the extent to which the illegal police conduct caused the defendant's response," not with a stopwatch.[15]

"When [police] enter unlawfully but mistakenly and in good faith, and when they obtain the knowing, intelligent, and voluntary consent of a third party without exploiting their unlawful entry in any way, the purposes of the exclusionary rule would not be served by excluding valuable evidence."[16] In this case, as in *Delancy*, there was no such exploitation and is no "taint" such as to make the evidence "fruit of the poisonous tree," if the consent was voluntary.[17] And it was.

We review voluntariness as a factual question that is determined under the totality of the circumstances.[18] Relevant factors include "voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and, significantly, the defendant's belief that no incriminating evidence will be found."[19]

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15. *Id.* at 1310 (internal quotation marks and citations omitted).

16. *Id.* at 1314.

17. *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 1291, 84 L. Ed. 2d 222 (1985).

18. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989).

19. *Id.*

Welch argues he was coerced into giving consent. The officers asked for consent a few minutes after entering his bedroom with their guns drawn. But Welch must not have felt coerced into consenting when they first asked, because he declined to consent. They took him out on the balcony, asked if they could search, and he told them they could not. A person who actually says "no" has not been coerced into saying "yes."

Thus at least up to the time Welch refused to consent, he cannot be said to have been coerced into consenting involuntarily. That leaves, for analysis of coercion and voluntariness, what happened after he said "no." The police officer standing on the balcony with him said, "Fine, but we're going to have to get a search warrant." That is not coercion vitiating voluntariness. And it did not. Welch still did not consent. What changed his mind was the officer's next remark, that "it would take a while."

The explicit threat here is that Welch might have to stand around with nothing to do for some substantial period of time, much as we all do whenever we are stuck in a line. It would be a delicate will indeed that might be overborne by the threat of a period of idleness and wasted time. Yet that threat, "it would take a while," is what changed Welch's "no" to a "yes."[20]

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20. Although Welch testified that the officers threatened to send his children to Child Services if he did not consent, the judge found that he was not telling the truth, and that this did not occur. That threat could not overbear his will, if, as the court reasonably found, it was not made. We do not mean to imply that a warning that social workers will come to care for children if their

The district judge provided a persuasive explanation of why Welch changed his mind. Welch, the court found, "reasonably believed that the officers would eventually be able to obtain a search warrant" and that, because he would have to wait on the balcony while they did, he would not be able to go into the apartment, retrieve the pistol and ammunition, and somehow dispose of them before the police came back with a warrant. So "it made sense for [Welch] to agree to the search rather than wait for the warrant to be obtained and, because of where the items were hidden, hope for the best." That was a rational gamble, but one that Welch lost. Welch's consent was not coerced, just constrained, by having to place his bet on one of two poor alternatives. Maybe if he let them in, the police would want to get the search done quickly and fail to find his contraband. Or maybe if he put them to the trouble of getting a search warrant, they would search more thoroughly because he had inconvenienced them.

The district court's findings were supported by the evidence and its conclusion that Welch gave legally efficacious consent to the search was correct.

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adult caregivers become unavailable on account of detention is necessarily an improperly coercive threat, as opposed to helpful information assuring that children will not be abandoned to the street.

B. Whether Florida Robbery Is a "Violent Felony"

The ordinary maximum sentence for being "a felon in possession of a firearm" is ten years imprisonment.[21] But if a felon in possession has three previous convictions for violent felonies or serious drug offenses, then the Armed Career Criminal Act requires a minimum sentence of fifteen years imprisonment.[22] Welch had three previous potentially qualifying convictions when he was sentenced to this statutory minimum. He argues on appeal that his 1996 Florida conviction for strong arm robbery does not qualify as a "violent felony." If that conviction were not counted as a predicate offense, he would not be subject to the statutory minimum.

The parties argue the case primarily under the categorical approach, not the modified categorical approach.[23] The record cognizable for purposes of the statutory enhancement is sparse. The presentence report says that according to the victim, Welch punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck. But the presentence report does

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21. 18 U.S.C. §§ 922(g)(1), 924(a)(2).

22. 18 U.S.C. § 924(e).

23. "Under [the categorical] approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." *James v. United States*, 550 U.S. 192, 202, 127 S. Ct. 1586, 1594, 167 L. Ed. 2d 532 (2007) (internal quotation marks and citations omitted).

not state the source of this information, and the record merely includes an information alleging that Welch unlawfully took jewelry from the victim's person "by the use of force, violence, assault, or putting . . . in fear," and a judgment showing that Welch pleaded guilty to this information, and was convicted of "strong arm robbery" in violation of Florida Statute Section 812.13(1). We decide this issue under the categorical approach.

The federal Armed Career Criminal Act defines "violent felony" as felonies that have as an element the "use, attempted use, or threatened use of physical force," or that are "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[24] Welch's Florida robbery conviction was pursuant to a statute that criminalized stealing property from another's person or custody using "force, violence, assault, or putting in fear."[25]

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24. "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

25. "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1).

Welch's argument is that the degree of "force" required to violate the state statute at the time of his conviction was too slight to satisfy the federal statute. His point is that Florida law at the time made mere snatching a robbery, and that mere snatching is not forceful enough to satisfy the federal statute under either the "elements clause" or the "residual clause" ("serious potential risk of physical injury to another") of the federal statute. We review de novo whether a prior crime qualifies as a violent felony under the statute.[26] In "determining whether a defendant was convicted of a 'violent felony,' we [turn] to the version of state law that the defendant was actually convicted of violating."[27]

In 1996, when Welch pleaded guilty to robbery, Florida law clearly established that a taking by stealth, as in pickpocketing where the victim is not aware of the theft, was merely larceny, not robbery.[28] But the state courts of appeal were divided on whether a snatching, as of a purse, or cash from a person's hand, or jewelry on the person's body, amounted to robbery.[29] Subsequently,

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26. *United States v. McGill*, 618 F.3d 1273, 1274-75 (11th Cir. 2010).

27. *McNeill v. United States*, *U.S.*, 131 S. Ct. 2218, 2222, 180 L. Ed. 2d 35 (2011).

28. *See McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976).

29. *See, e.g., Goldsmith v. State*, 573 So. 2d 445, 445 (Fla. 2d Dist. Ct. App. 1991) (holding that the "slight force used to remove the bill from [the victim's] hand" was "insufficient to constitute the crime of robbery"); *A.J. v. State*, 561 So. 2d 1198, 1198 (Fla. 3d Dist. Ct. App. 1990) (holding that "the degree of force

a new Florida statute established the crime of "robbery by sudden snatching," in between larceny and robbery.[30] This statute appears to have been a legislative response to a 1997 Florida Supreme Court decision holding that "there must be resistance by the victim that is overcome by the physical force of the offender" to establish robbery, so that the intermediate appellate decisions holding mere snatching to be sufficient were put in doubt.[31] Welch pleaded guilty before the Florida Supreme Court decision and the new statute, in a judicial district that had not yet

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used to [grab a camera hanging from the victim's shoulder] was insufficient to constitute robbery"); *Larkins v. State*, 476 So. 2d 1383, 1385 (Fla. 1st Dist. Ct. App. 1985) (holding that "sufficient force was exercised to fulfill the requirements of the robbery statute" where the robber grabbed cash out of the victim's hand); *Andre v. State*, 431 So. 2d 1042, 1043 (Fla. 5th Dist. Ct. App. 1983) (holding that "the act of 'snatching' money from another's hands is force and that force will support a robbery conviction").

30. "'Robbery by sudden snatching' means the taking of money or other property from the victim's person, with intent to permanently or temporarily deprive the victim or the owner of the money or other property, when, in the course of the taking, the victim was or became aware of the taking. In order to satisfy this definition, it is not necessary to show that: (a) The offender used any amount of force beyond that effort necessary to obtain possession of the money or other property; or (b) There was any resistance offered by the victim to the offender or that there was injury to the victim's person." Fla. Stat. § 812.131 (2000).

31. *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997) (holding that robberies must "be accomplished with more than the force necessary to remove the property from the person").

spoken definitively on the question,[32] and at a time when the controlling Florida Supreme Court authority held that "any degree of force" would convert larceny into a robbery.[33] So we assume for purposes of analysis that Welch pleaded guilty to robbery at a time when mere snatching sufficed.[34]

United States v. Lockley holds that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines.[35] Welch argues that we should distinguish *Lockley* for two reasons. First, Welch points out that *Lockley* held that Florida attempted robbery is a "crime of violence" under the Sentencing Guidelines,[36] while

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32. *See Santiago v. State*, 497 So. 2d 975, 976 (Fla. 4th Dist. Ct. App. 1986) (holding that where a defendant reached into a car and tore necklaces off of a victim's neck, leaving scratch marks, evidence of force was sufficient to support a robbery because the "facts of this case, unlike picking a pocket or snatching a purse without any force or violence, show sufficient force, *be it ever so little*, to support robbery") (emphasis added).

33. *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976).

34. "A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983).

35. *United States v. Lockley*, 632 F.3d 1238, 1246 (11th Cir. 2011).

36. "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--(1) has as an element the use, attempted

the issue here is whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.[37] Second, Welch argues that we should distinguish *Lockley* because Lockley was convicted after Florida promulgated the "sudden snatching" statute, so snatching from the person might furnish the basis for a robbery conviction here but not in *Lockley*.

We conclude that even though these distinctions may fairly be made, they should make no difference. We have recognized that the definitions of "crime of violence" under the Sentencing Guidelines and "violent felony" under the Armed Career Criminal Act are "virtually identical," and have held that "[c]onsidering whether a crime is a 'violent felony' is similar to considering whether a conviction qualifies as a 'crime of violence[.]'"[38] We see no reason not to apply *Lockley* to a case addressing whether Florida robbery is a "violent felony" under the Armed Career Criminal Act.

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use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (2002).

37. "[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]" 18 U.S.C. § 924(e)(2)(B).

38. *U.S. v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010) (internal quotation marks and citations omitted).

We also see no reason not to apply *Lockley* to 1996 Florida robbery, even if robbery at that time could be accomplished by mere snatching. Welch's strongest argument comes from a footnote in *Lockley* distinguishing the new "robbery by sudden snatching" statute. It notes that while sudden snatching involves "pick-pocketing or other similar activity (so long as the victim is in possession of the money or property and realizes he is being victimized)," robbery under the Florida robbery statute "concerns a far more aggressive and potentially violent form of robbery."[39] Though *Lockley* does not reach the question of whether robbery by sudden snatching would or would not present "a serious risk of physical injury to another" under the residual clause, we conclude that it does.

Welch correctly points out that under *Johnson v. United States*, "physical force" means not merely what "force" means in physics, but "*violent* force--that is, force capable of causing physical pain or injury to another person."[40] That *Johnson* discussion was in the context of the elements clause requirement of "physical force," not the residual clause requirement of "serious risk of potential injury to another." Arguably the elements clause would not apply to mere snatching, but the issue is not cut and dried. We need not decide whether snatching is sufficiently violent under the elements clause, though, because it suffices under the residual clause.

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39. *Lockley*, 632 F.3d at 1246 n.7.

40. *Johnson v. United States*, *U.S.*, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1 (2010).

We look at the statute of conviction to see whether, under the residual clause, "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."[41] Under *United States v. Harrison*, we apply a three-step analysis to see: (1) how the crime is ordinarily committed; (2) whether the crime poses a "serious potential risk of physical injury," similar in degree to the listed crimes; and (3) whether the crime is similar in kind to the listed crimes, or, using the language from *Begay v. United States*, whether the crime is "purposeful, violent, and aggressive."[42] *Sykes v. United States* partially abrogated *Harrison*,[43] and we recently revisited *Harrison* in *United States v. Chitwood*.[44] *Chitwood* limits *Begay*'s "purposeful, violent, and aggressive" language to "strict liability, negligence, and recklessness crimes."[45] Offenses that are not "strict liability, negligence, and recklessness crimes," like robbery, fall within the residual clause "if they categorically pose a serious risk of physical injury that is similar to the risk posed by one of the enumerated

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41. *James*, 550 U.S. at 202, 208.

42. *United States v. Harrison*, 558 F.3d 1280, 1287 (11th Cir. 2009); *Begay v. United States*, 553 U.S. 137, 145, 128 S. Ct. 1581, 1586, 170 L. Ed. 2d 490 (2008).

43. *Sykes v. United States, U.S.*, 131 S. Ct. 2267, 2277, 180 L. Ed. 2d 60 (2011).

44. *United States v. Chitwood*, 676 F.3d 971 (11th Cir. 2012).

45. *Id.* at 979; *United States v. Schneider*, __ F.3d __, 2012 WL 1868645, at *5 (11th Cir., May 24, 2012).

crimes."[46]

Sudden snatching ordinarily involves substantial risk of physical injury to the victim. The victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury. For example, in the Florida Supreme Court case with the "any degree of force" language, the old woman died from the fall she took when the robber grabbed her purse in a parking lot.[47] In that respect, the crime is much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue.[48]

We conclude that Florida robbery, both before and after Florida promulgated the "robbery by sudden snatching" statute, qualifies as a violent felony under the Armed Career Criminal Act.

AFFIRMED.

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46. *Id.*

47. *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976).

48. "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party--whether an occupant, a police officer, or a bystander--who comes to investigate." *James*, 550 U.S. at 203, 127 S. Ct. at 1594.

APPENDIX J — SECOND PLEA AGREEMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-CR-60212-KAM

UNITED STATES OF AMERICA

VS.

GREGORY WELCH,

Defendant.

PLEA AGREEMENT

The United States of America and Gregory Welch (hereinafter referred to as the "Defendant") enter into the following agreement:

1. The Charges to which the Defendant Is Pleading Guilty: The Defendant agrees to plead guilty to the sole Count of the Indictment. That Count charges that, on or about March 19, 2009, in Broward County, in the Southern District of Florida, the Defendant, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

2. The Elements of the Offenses of Conviction: The elements of the offense of possession of a firearm and ammunition by a convicted felon, in violation of Title 18, United States Code, Section 922(g)(1), as charged in the sole Count of the Indictment, are as follows:

First, that the Defendant knowingly possessed a firearm in or affecting interstate commerce, as charged; and

Second, that before the Defendant possessed the firearm, the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

3. Statutory Penalties: The Defendant also understands and acknowledges that, as to the sole Count of the Indictment, the Court must impose a mandatory minimum sentence of fifteen (15) years' imprisonment, and may impose a maximum sentence of life imprisonment, to be followed by up to five (5) years' supervised release, and may impose a fine of $250,000. The Defendant understands and acknowledges that a violation of the terms of his supervised release can result in additional criminal penalties.

4. Special Assessment: The Defendant further understands and acknowledges that, in addition to the sentence imposed under paragraph 3 of this Agreement, a special assessment in the amount of $100 will be imposed. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. Applicability of Sentencing Guidelines: The Defendant is aware that the sentence will be imposed by the Court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a Pre-Sentence Investigation by the Court's Probation Office, which investigation will commence after the entry of the Defendant's guilty plea. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant further understands that the Court is required to consider the advisory guideline range determined under the sentencing guidelines, but is not bound to impose that sentence; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to

the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant cannot withdraw his guilty plea solely as a result of the sentence imposed.

6. Rights Waived by Pleading Guilty: The Defendant understands that by pleading guilty, he knowingly and voluntarily waives the following rights:

a. the right to plead not guilty and to persist in a plea of not guilty;

b. the right to a speedy and public trial before a jury of his peers;

c. the right to the effective assistance of counsel at trial, including, if the Defendant could not afford an attorney, the right to have the Court appoint an attorney for the Defendant;

d. the right at trial to be presumed innocent until guilt has been proven beyond a reasonable doubt by the United States;

e. the right at trial to confront and cross-examine witnesses against the Defendant;

f. the right to compel or subpoena the testimony of witnesses and other evidence to present at trial;

g. the right at trial to testify or to remain silent, and the right that such silence could not be used against the Defendant;

h. the right to challenge the sufficiency of the indictment; and

I. the right to appeal any pretrial rulings or a finding of guilt.

7. Government's Right to Disclose Information to the Court: The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. Acceptance of Responsibility: The United States and the Defendant agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the Court should reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level

is determined to be 16 or greater, and the Defendant complies with the requirements of Section 3E1.1, the United States will make a motion requesting an additional one-level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

9. Limitation on Joint Sentencing Recommendations: The Defendant understands and agrees that the United States will not be required to make the motion and sentencing recommendation set forth in paragraph 8 if the Defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the government prior to entering this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

10. Factual Proffer: The Defendant, his counsel, and the United States further agree that had this case proceeded to trial, the United States would have introduced the following evidence, which is sufficient to support a guilty plea and proves beyond a reasonable doubt

that the Defendant is guilty of the crime charged in the sole Count of the Indictment:

On March 17, 2009, law enforcement officers searched Defendant's apartment. A Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504, was found in the attic space in the apartment. The firearm was loaded with six (6) rounds of ammunition, five (5) of which were Winchester .380-caliber ammunition, and one (1) of which was Remington .380-caliber ammunition. After the items were found, Defendant gave a recorded statement admitting to possession of the firearm and ammunition. The firearm and all six (6) rounds of ammunition have traveled in interstate or foreign commerce. The Defendant is a previously convicted felon.

11. No Promises or Representations Regarding Ultimate Sentence: The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office, or the Court. The Defendant understands further that any recommendation that the government makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose. The

Defendant understands and acknowledges, as previously acknowledged in paragraph 5 above, that the Defendant may not withdraw his plea based upon (a) the Court's decision not to accept a sentencing recommendation made by the Defendant and/or the government, or (b) the fact that he received an incorrect estimate of the sentence that he would receive, whether that estimate came from his attorney, the United States, and/or the Probation Office.

12. Voluntariness of Plea: The Defendant agrees that he has entered into this Plea Agreement freely and voluntarily, and that no threats or promises, other than the promises contained in this written Plea Agreement, were made to induce the Defendant to enter his plea of guilty.

13. Forfeiture and Consent to Disposal/Destruction of Firearm and Ammunition: The Defendant agrees to forfeit all interests in any firearm or ammunition that is the subject of the Indictment, which the Defendant currently owns or has previously owned, or over which the Defendant currently, or has in the past, exercised control, directly or indirectly. This includes, but is not limited to,

(a) one (1) Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504;

(b) five (5) rounds of Winchester .380-caliber ammunition; and

(c) one (1) round of Remington .380-caliber ammunition.

Defendant further agrees to hold the United States, its agents, and employees harmless from any claims whatsoever in connection with the seizure or destruction of property covered by this agreement. The Defendant agrees that this property may be destroyed or disposed of in accordance with the policies and procedures of the custodial agency. The Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any destruction or disposal of property carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant acknowledges that all property covered by this agreement is subject to forfeiture as property involved in illegal conduct related to the sole Count of the Indictment.

14. Conditional Appeal. Pursuant to Federal Rule of Criminal Procedure 11(a)(2), the United States consents to the Defendant's entry of a conditional plea of guilty and a reservation of the right to have an appellate court review the district court's denial of his motion to suppress the physical evidence, specifically, the Lorcin, Model L380, .380-caliber semi-automatic pistol, serial number 532504; the five (5) rounds of Winchester .380-caliber ammunition; and the one (1) round of Remington .380-caliber ammunition. The United States and the Defendant agree that the suppression issue pertaining to the physical evidence is case dispositive.

15. Entire Agreement: This is the entire agreement and understanding between the United States and the

Defendant. There are no other agreements, promises, representations, or understandings. This Agreement binds only the United States Attorney's Office for the Southern District of Florida. It does not bind any other United States Attorney's Office, or any other office or agency of the United States, or any state or local prosecutor.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 9/17/10 By: /s/_____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Date: 9/8/10 By: /s/_____
GREGORY WELCH,
DEFENDANT

Date: 9/8/10 By: /s/_____
PETER BIRCH
ATTORNEY FOR DEFENDANT

APPENDIX K — JUDGMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

Case Number - 0:09-60212-CR-MARRA-1

UNITED STATES OF AMERICA

v.

GREGORY WELCH

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment on September 17, 2010. The defendant is adjudicated guilty of the following offense:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 922(g)(1)	Possession of a firearm by a convicted felon	March 19, 2009	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Appendix K

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
9/17/10

/s/
KENNETH A. MARRA
United States District Judge

September 20, 2010

Appendix K

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months** as to Count One of the Indictment.

The Court makes the following recommendations to the Bureau of Prisons:

> The defendant be designated to FCI - Miami and that he enter the Bureau of Prisons 500 hour Drug Treatment Program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshall

By: _____
Deputy U.S. Marshall

Appendix K

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

Appendix K

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance

or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix K

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Appendix K

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$100.00	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix K

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$100.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Appendix K

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX L — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED SEPTEMBER 17, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-60212-CR-MARRA

UNITED STATES OF AMERICA,

Government,

-v-

GREGORY WELCH,

Defendant.

West Palm Beach, Florida

September 17, 2010

TRANSCRIPT OF CHANGE OF PLEA
AND SENTENCING PROCEEDINGS

BEFORE THE HONORABLE
KENNETH A. MARRA

UNITED STATES DISTRICT JUDGE

Appendix L

[2](Call to the order of the Court.)

THE COURT: Good afternoon, please be seated.

All right. This is the case of the United States of America versus Gregory Welch, Case Number 09-60212-CR-MARRA.

May I have counsel state their appearances, please.

MR. LINDER: Good afternoon, Your Honor. Jason Linder, on behalf of the United States.

MR. BIRCH: Good afternoon, Your Honor. Peter Birch, representing Gregory Welch, who's seated to my left.

THE COURT: Good afternoon.

All right. So as I understand it, Mr. Welch is going to be repleading to the charges based -- and his prior plea agreement is being, I guess, voided by both parties; is that correct?

MR. LINDER: Yes, Your Honor.

What happened is when he pled initially, neither party contemplated that he would be an armed career criminal. The PSI came back and indicated that he is, although Mr. Birch I think has a different view about that.

Appendix L

To make sure that there's no Rule 11 problem, nothing that will later have it set aside on habeas, the safer course is to vacate the old plea and redo a Rule 11 colloquy where the Defendant is advised of his new maximum penalties. Also, there is a revision to the plea agreement. The plea agreement is the same as the original one, except that there is no [3]longer an appellate waiver so that he can appeal both the suppression ruling that Your Honor made and the sentence that will likely be imposed today.

THE COURT: Okay. And is that correct, Mr. Birch?

MR. BIRCH: Yes, Your Honor. He is potentially an armed career criminal, and everything that Mr. Linder said is correct.

To avoid interrupting the Court during the plea colloquy, I'd just like to have it noted that even though it does state in the plea agreement that he's facing a mandatory minimum of 15 years to a maximum of life, that's assuming the Court does find he's an armed career criminal, which we're reserving the right to litigate after the plea.

* * *

[20]THE COURT: In the case of the United States of America versus Gregory Welch, it's the finding of the Court [21]that the Defendant is fully competent and capable of entering an informed plea, that he is aware of the nature of the charge and the consequences of his plea, that his plea of guilty is a knowing and voluntary plea,

supported by an independent basis in fact containing each of the essential elements of the offense.

The plea is therefore accepted, and the Defendant is now adjudged guilty of the one count of the indictment.

All right. You can have a seat, Mr. Welch.

All right. I'm going to find, based on the fact that we have a presentence report already prepared relative to the first plea agreement, that I have sufficient information to exercise meaningful sentencing authority, and we don't need to do another presentence report. I guess the report I have, though, doesn't have the guidelines under the new — the recommendation I have under the old report is a 120-month maximum.

Did you do a new blue sheet?

PROBATION OFFICER: No, Your Honor. I'm sorry, we did not.

THE COURT: Okay. So it's still a -- is it offense level 30?

PROBATION OFFICER: The only information that would change based upon the form that Your Honor's referring to would be the custody range and the supervised release range, [22]as well.

THE COURT: All right.

PROBATION OFFICER: So the offense level and the criminal history would be correct.

THE COURT: All right. So it's 15 years to life is the -- is the statutory provision range, right?

PROBATION OFFICER: That is correct. Then the custody range for this particular defendant would be 168 to 210 months.

THE COURT: With a 180 minimum mandatory?

PROBATION OFFICER: Correct.

THE COURT: All right. What else changes? Doesn't the supervised release change?

PROBATION OFFICER: The supervised release change is a minimum of five years?

MR. LINDER: Maximum of five years.

PROBATION OFFICER: You're correct.

MR. LINDER: It goes from a max of three to a max of five.

THE COURT: What's the guideline supervised release range, is it three to five years?

PROBATION OFFICER: No, that would remain the same.

THE COURT: Two to three?

Okay. Does the fine range change?

PROBATION OFFICER: No, the fine range remains the [23]same.

THE COURT: Okay. All right. So Mr. Birch, you want to be heard on your objections to the guideline calculations, the new guideline calculations?

MR. BIRCH: Yes, Your Honor.

First, it was an oversight on my part to not object under Apprendi and its progeny that the sentence cannot be enhanced based on convictions that were not set forth in the indictment. I filed a supplemental objection to preserve this. This is the Apprendi objection that candidly we make in every case, at the same time recognizing Almendarez-Torres compels the Court to overrule that objection. We're simply making that objection to preserve it for appellate purposes.

That having been said, I -- if I could work backwards for a second. I don't want anything that I say to be understood as withdrawing anything that I've said -- or, excuse me, anything that I've objected to by way of a written objection. I would certainly adopt all of the objections that I made in writing and have filed with the Court. But having said that, I'd like to work backwards.

Appendix L

I filed a sentencing memorandum that address the felony battery conviction, because, quite candidly, I was close to conceding that one. But then I thought about it further, researched Florida case law and decided not to waive that objection, and here's why.

[24]I filed a copy of the information on the felony battery and the judgment for the felony battery and also a transcript of the plea colloquy. And I would concede, as I read the case law, federal and state -- well, federal for the moment -- that the way the information reads in this felony battery statute would constitute a crime of violence, in that it has the what I refer to as the "to wit" provision in the information, which states, "by striking John Andrew on the head with the hammer or other blunt object." And that's why I nearly conceded it.

And then thought, in reviewing the transcript, which struck me as odd, is that it's a plea of no contest before the Broward circuit court judge. That didn't strike me as odd. What struck me as odd was that there is not even any mention of a factual basis; it's never discussed. And then in the judgment there's no factual finding.

So I would submit that because there was never an admission by the Defendant as to that "to wit" phrase, and that since they're all -- and there was never any finding by the Court as to that phrase, and since the crime can be committed in an alternative manner, that that should not be binding on whether or not it is a crime of violence.

Now, I want to say that in researching this, and I simply ran out of time, Florida case law seems to suggest that if you plead it a certain way, you have to prove it that way. [25]Yet, I did find some other cases that suggested that if that did not happen but there is no objection, it's something that's waivable.

So the bottom line is that I would submit that since that factual element, the "to wit" phrase, was never addressed by either the Defendant or the Court, that under Johnson, the United States Supreme Court case dealing with felony battery, that it is not a crime of violence. Now, of course, Johnson dealt with a felony battery based on a prior conviction, so that is distinguishable from this. But given what I just said, I would submit that it's not a crime of violence.

That's my argument as to the felony battery.

Now, the robbery conviction -- and I'm speaking specifically about the robbery conviction. There are two that remain, are mentioned in the indictment. One was actually an attempted robbery. I'm referring to the robbery that's referred to as Case Number 1996-CF-005680. That conviction doesn't have -- that's where my sentencing memorandum, I attached a copy of the information in that case, along with the judgment, and there is no limiting language in the robbery case. It simply states that the robbery was committed by the use of force, violence, assault or putting in fear the victim.

My argument there is twofold. One is under Florida law, a robbery can be committed with a minimal amount of force. Under the United States Supreme Court of Johnson [26]that's cited in my sentencing memorandum, the force has to be to the degree -- they refer to it as physical force, meaning violent force. That is, force capable of causing physical pain or injury to another person. And I would submit that the force required under the Florida robbery statute does not meet the definition of force under Johnson.

Now, my other argument in this matter regarding the robbery conviction is that regardless of the degree of force, the statute reads "force, violence, assault or putting in fear," therefore giving you these alternative ways. And I would submit that the alternative ways do not always constitute a crime of violence. There's no physical -- under the Begay case, there's no purposeful -- it's reading as I cite, I believe, in -- yeah, purposeful, violent and aggressive conduct is how Begay defined a crime of violence. And I would submit that given the way the Florida Statute of robbery is written, that that does not require a purposeful, violent and aggressive act and therefore is not a crime of violence, particularly the putting in fear case -- part.

And I would -- and I didn't mention this in my sentencing memorandum, but there -- I just found out the other day I had -- it's a South Carolina case out of I think it's Rosemond, R-o-s-e-m-o-n-d, and I have it if the Court wants to see it. Interestingly enough, it was somebody who walked in and glared at the cashier in a store and didn't say anything, [27]went into the restroom

of the store, came out, and it's when he came out that he was glaring at her, and she got frightened and ran from that area of the store, and then he picked up a cash register and badged it open, and the South Carolina court found that was sufficient to put somebody in fear.

And then there was an old case I believe that I cited in my -- yes, in the Florida case, Montsdoca versus State, which is cited in my sentencing memorandum -- Montsdoca, M-o-n-t-s-d-o-c-a -- it makes reference to putting in fear as referring to telling somebody, I'm going to take this, and if you don't -- if you try to stop me, I'm going to accuse you of some act of sodomy or something like that. It makes reference to that. Doesn't hold that, but it just shows there are other ways.

Now, having said that, I want to point out to the Court that all the case law that I have found talks about the fear aspect under Florida law, that it's fear of death or great bodily harm. So I just wanted to qualify that.

It's just interesting though. My point being is that you don't need to commit a purposeful aggressive act to commit robbery under Florida law, that it can be done with minimal force or minimal conduct that causes the victim to respond in a certain way, and that that doesn't meet the definition in federal law as a crime of violence. So because of that, it's our position that the robbery conviction mentioned in my [28]sentencing memorandum is not a crime of violence. And to be clear, we're not challenging the other robbery.

And that's it.

THE COURT: Thank you.

Mr. Linder?

MR. LINDER: Thank you, Your Honor.

I had intended to rely just on the probation's response to the original objections. I filed something very briefly this afternoon, Your Honor, in response to the three filings that were made this week. I don't know if you have it in front of you.

THE COURT: I got it. I read it.

MR. LINDER: Okay. Good. It was very short.

Let's take the felony battery first.

Mr. Birch analyzes it under what the Supreme Court calls the modified categorical approach, looking at the face of the information and the judgment. I don't think you need to go that far.

Under the categorical approach, the felony battery statute under which Mr. Welch was convicted is plainly a crime of violence. As the Court will recall, the Supreme Court decided earlier this year that a different felony battery statute was not necessarily a crime of violence. That was Johnson versus United States. That was the recidivist statute that said if you've done it in the past, committed misdemeanor [29]battery, you do it again, it's a felony.

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The statute under which Mr. Welch was convicted requires as one of its elements proof of great bodily harm, permanent disability or permanent disfigurement. There is no way to commit that crime that doesn't satisfy the Johnson requirement of force capable of causing physical pain or injury to another person. So it seems to me that as a categorical matter, that statute is plainly a crime of violence.

Were you to choose instead to look at it as a modified categorical issue, Mr. Birch is also correct that the face of the information satisfies that analysis, as well. The information does say he committed the crime, to wit -- I forget the exact language; I can pull it -- hitting somebody about the head.

And I would note for the Court that while it's true the plea colloquy contains no sort of factual proffer per se, the Defendant's lawyer, at page 7 of the colloquy that was submitted, does concede that Mr. Welch, in fact, beat the victim around the head. He was talking now about how it had been two years ago, and that was water under the bridge, and he said, it was two years ago, the head is healed. So he concealed the crime happened the way it was alleged in the information.

Turning to the robbery. One of the cases that I [30]submitted this morning or this afternoon was United States versus Pitts. That is an Eleventh Circuit decision from less than three weeks ago deciding that as a categorical matter, a California robbery statute was a crime of violence. The language is somewhat different,

it required force or fear, but it's functionally identical to the robbery statute under which Mr. Welch was convicted earlier. And what the Court held there was that there's no way to put somebody in fear other than fear of physical harm, and so that's enough to qualify.

As to the degree of force involved, you know, I guess I would concede that the statute doesn't have a requirement in about how much. I would contrast it with the robbery by snatching sub-statute, which explicitly says no force is required beyond that required to physically grab whatever item is being snatched; whereas here, this is robbery by use of force, assault, fear, intimidation. It seems to me that's also categorically a crime of violence.

That's all I really have.

THE COURT: Thank you.

Anything else, Mr. Birch?

MR. BIRCH: I suppose I should just simply note that this Pitts case that I scanned over, receiving it only a little bit ago, but I just wanted to point out, as the Court I'm sure is aware, it's an unpublished opinion having no precedential value whatsoever. So I wanted to make that [31]clear, as well.

THE COURT: Thank you.

All right. I'm going to overrule the objections for the following reasons:

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First, as to the battery, Mr. Welch pled guilty -- pled no contest actually to the crime which was alleged in the information -- where is it? I can't put my hands on it now.

MR. LINDER: Your Honor, what are you looking for exactly?

THE COURT: I'm looking for the information in the battery case.

MR. LINDER: I can hand it up to the Court if you would like.

THE COURT: I had it, I just don't know what I did with it.

Thank you.

MR. LINDER: You're welcome.

THE COURT: Here it is. I found it.

The information in the battery case was for felony battery, paren great bodily harm, permanent disability or permanent disfigurement, end paren, is what the captioned charge was. And then in the body of the information. it alleges that "the Defendant did unlawfully, actually and intentionally touch or strike John Andrew against his will and caused great bodily harm, pei manent disability or permanent [32]disfigurement, to wit, by striking John Andrew on the head with the hammer or other blunt object."

So that was what the charge was. He pled no contest to that charge. Now, it's true that the plea colloquy, for whatever reason, there was no factual predicate addressed at the time of the plea. As Mr. Linder points out, his lawyer -- and I'm not sure that this -- I'm not sure how much that it helps or hurts -- said that the head had healed at one point in that plea colloquy or in the discussion before the Court, but even without that, excluding that, he pled no contest to what was alleged here. There's nothing in the plea colloquy that suggests anything other than what's alleged here, and I believe that that is sufficient to find that he was found guilty of doing what's alleged in the information. There's nothing to indicate to the contrary.

And certainly striking someone against his will and causing great bodily harm, permanent disability or permanent disfigurement by being struck over the head with a hammer or other blunt object is -- I think meets the standards for a violent felony.

Now, as to the robbery, I want to go back further than the Pitts opinion that came out a few weeks ago and start with *United States versus Wilkes*, 464 F.3d 1240, decided by the Eleventh Circuit in 2006. It's not directly on point, but I think it gives some guidance.

[33]In that case, the Defendant was -- it was again a question of whether he should be considered an armed career criminal. The issue in the case really was whether or not his -- the Defendant's convictions as a youthful offender should be counted as convictions under the armed career criminal statute. But one of the convictions which

was in question was strong-arm robbery, which is exactly what is alleged in this case. The judgment is strong-arm robbery in the case to which the Defendant is lodging an objection, and it was a Florida conviction for strong-arm robbery, and that counted as an armed career criminal enhancement.

Again, it wasn't directly on point, because the real issue was whether or not the youthful offender conviction counted.

Then we go to *United States versus Wilkerson*, W-i-l-k-e-r-s-o-n, 286 F.3d 1324, Eleventh Circuit in 2002. Now, in this case, the Defendant was -- had a prior conviction for conspiracy to commit robbery. The question was whether conspiracy to commit robbery was a violent felony. And the Court in that case held it was, and the Court indicated that "Florida law defines the offense of robbery as the taking of another's property by the use of force, violence, assault or putting in fear. Thus defined, robbery clearly constitutes a violent felony within the meaning of Section 924(e)(2)(B)," citing *United States versus Jackson*, 57 F.3d 1012, Eleventh [34]Circuit, 1995.

The Court in the Wilkerson opinion says, "and because robbery, as defined by Florida law, involves conduct that presents a serious potential risk of physical injury to another, we conclude that conspiracy that has as its object the offense of robbery likewise presents such a risk."

All right. That was Wilkerson in 2002.

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Earlier this year, February, the Eleventh Circuit decided *United States versus Whitson*, W-h-i-t-s-o-n, 597 F.3d 1218. In *Whitson*, the Eleventh Circuit retracted or retreated from its position that conspiracy to commit a robbery is a violent felony after Begay and James. However, in doing that they said, "we stand by Wilkerson as far as it concerns serious risk of physical injury, and its reasoning remains sound even after Begay."

So even though they reversed themselves in terms of under the new Supreme Court decisions as to what violent felonies are, saying conspiracy to commit a robbery is not a violent felony, they said the reasoning of Wilkerson about the robbery itself and what it constitutes in terms of posing a serious risk of physical injury, that's sound and that still applies. Now, this was decided before *Johnson*, a month before *Johnson*, but I think that I need to, you know, follow that dictate.

And then we get to the two post-*Johnson* cases that I [35]came across, *United States versus Oner*, O-n-e-r, 210 -- excuse me, 2010 Westlaw 2381055, decided on June 15th of this year. It's an unpublished opinion. And, again, it's not completely on point, but the question was whether armed robbery was a violent felony post-*Johnson*. And this is not an armed robbery, but -- and they said armed robbery was. And in so doing, they said that the statute requires the taking of another's money or property by the use of force, violence, assault, or putting in fear while carrying a firearm or other deadly weapon. And this -- the *Oner* case really doesn't help us, because the gun in and of itself was sufficient to raise it to the whatever level you needed

to, the fear of having a gun. So it's just a post-*Johnson* case. But I think the *Pitts* case is the one that, although it's not binding, I think that supports the conclusion that robbery still in the Eleventh Circuit would be considered a violent felony.

And as Mr. Linder pointed out, it was interpreting a California statute, but it also had the term "by means of force or fear," and that's the "or fear" is what the Defendant is basing its main argument on, that because it could be by fear, and the fear does not necessarily rise to the level of violence that is required under the *Johnson* opinion, that it doesn't qualify. And the Court said, "a violent felony includes the threatened use of physical force against the person of another. We cannot think of any logical way for a [36]defendant to place fear in the victim of a robbery other than by threatening physical harm. We cannot think of any other logical way for a defendant to place fear in the victim of a robbery other than by threatening physical harm."

So it seems to me they're saying fear is being -- by definition, is being imposed by a threat of harm. And I think if you read the *Pitts* opinion, again, which is not binding, in conjunction with the *Wilkerson*, the portion of *Wilkerson* that's still, according to the Eleventh Circuit as recently as February, is still good law, that robbery is a crime of violence, and therefore I believe the -- both of the challenged convictions do qualify, and therefore the Defendant is an armed career criminal under the guidelines.

MR. LINDER: Your Honor, may I ask, because it will be an appeal, may I ask two points of clarification?

THE COURT: Yes.

MR. LINDER: As to the battery statute, are you deciding under the categorical or the modified categorical approach that it's a crime of violence?

THE COURT: Well, I agree with you that it's — under both. I think it's a crime of violence under both approaches.

MR. LINDER: And then as to the robbery statute. The reason I'm asking is your reference to *Wilkerson* — *Whitson*, those are cases that decided that robbery was a crime of violence under the so-called residual clause, and I believe [37]it's 924(e)(2)(B)(ii), whereas *Pitts* decides that it's a crime of violence under the elements clause of 924(e)(2)(B)(i), and I just want to be clear for the record which clause —

THE COURT: I think it meets both tests, but if it doesn't meet the -- the elements test, I think it meets the residual test.

MR. LINDER: Thank you, Your Honor. I just wanted to be clear for the record. Thank you.

THE COURT: So anything else on those issues?

MR. BIRCH: Not on those issues, Your Honor.

THE COURT: All right. Are there any other issues regarding the presentence report?

MR. BIRCH: No, Your Honor.

MR. LINDER: No, Your Honor.

THE COURT: All right. Then I'll adopt the findings of the presentence report as the -- the modified findings as the findings of the Court.

All right. Mr. Linder, what's your position regarding sentencing?

MR. LINDER: Your Honor, I believe the correct guideline range now is 180 to 210 months' imprisonment; is that correct?

PROBATION OFFICER: Yes, correct.

MR. LINDER: The Government would recommend a sentence at the low end of that range, the 180 months, Your [38]Honor.

THE COURT: Mr. Birch?

MR. BIRCH: Your Honor, I would certainly agree that 180 months is sufficient but not more than necessary in this case and would ask that the Court impose that sentence.

***

[39]THE COURT: All right. The Court has considered the statements of all the parties, the presentence report which contains the advisory guidelines, as well as the statutory factors set forth in 18 U.S.C., Section 3553(a) (1) through (7).

It is the finding of the Court the Defendant is not able to pay a fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Gregory Welch, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months. Upon release from imprisonment, the Defendant shall be placed on supervised [40]release for a term of three years.

Within 72 hours of his release, the Defendant shall report in person to the probation office in the district where he's released.

While on supervised release, the Defendant shall not commit any crimes, he shall be prohibited from possessing a firearm or other dangerous devices, and he shall not possess a controlled substance.

He shall cooperate in the collection of DNA, shall comply with the standard conditions of supervised release that have been adopted by this court, as well as the following special conditions:

Surrendering to Immigration for removal after imprisonment, substance abuse treatment and permissible search, as noted in Part G of the presentence report.

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The Defendant shall also immediately pay to the United States a special assessment of $100.

Total sentence is 180 months' imprisonment, three years' supervised release and a $100 special assessment.

Now that sentence has been imposed, does the Defendant or his counsel object to the Court's findings of fact or the manner in which sentence was pronounced?

MR. BIRCH: Yes, Your Honor. We would renew all of our objections to the Armed Career Criminal Act being applied to Mr. Welch, as well as the Apprendi objection I made earlier [41]and would object to the Court's findings of fact to the contrary of our position as previously stated, and we just readopt everything.

THE COURT: All right. Thank you.

****

APPENDIX M — WELCH'S SUPPLEMENTAL OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

SUPPLEMENTAL OBJECTION TO PRESENTENCE INVESTIGATION REPORT

Defendant, Gregory Welch, Campos, by and through his undersigned counsel, submits the following supplemental objection to the presentence investigation report (PSI).

As to paragraph 21, Defendant maintains that pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), *Blakely v. Washington*, 524 U.S. 296, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the armed career criminal enhancement should not apply as this aggravating factor is based upon convictions that were not charged in the

indictment. *But see Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998). Defendant submits it is a violation of the Fifth and Sixth amendments for this enhancement to apply without being charged in the indictment, and determined by a jury.

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

/s/ Peter Birch
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APPENDIX N — WELCH'S NOTICE OF FILING AND SELECT ATTACHMENTS, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

NOTICE OF FILING

Defendant, Gregory Welch, files the following in support of his objections to the Presentence Investigation Report:

1. Information for Felony Battery, Case No. 03-17694-CF 10.

2. Judgment for Felony Battery, Case No. 03-17694-CF 10.

3. Transcript of Plea Colloquy in Case No. 03-17694 CF 10.

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Respectfully submitted,

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Peter Birch
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***

Appendix N

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

vs.

GREGORY WELCH

INFORMATION FOR FELONY BATTERY (GREAT BODILY HARM, PERMANENT DISABILITY OR PERMANENT DISFIGUREMENT)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that GREGORY WELCH on the 18th day of May, A.D. 2003, in the County and State aforesaid, did unlawfully actually and intentionally touch or strike John Andrew against his will and caused great bodily harm, permanent disability or permanent disfigurement, to-wit: by striking John Andrew on the head with a hammer or other blunt object, contrary to F.S. 784.041, (L6),

***

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17th Judicial Circuit in and for Broward County

DIVISION: CRIMINAL **DIVISION:** FP

JUDGMENT

THE STATE OF FLORIDA VS. CASE NUMBER

DEFENDANT GREGORY WELCH 03-17694 CF 10
☐ Probation Violator

State Attorney Alan John-Baptiste
Court Reporter Shelly Flaherty

The Defendant, Gregory Welch being personally before this Court represented by Michael Gelety, his attorney of record, and having:

(Check applicable provision)
☐ Been tried and found guilty of the following crime(s)

☐ Entered a plea of guilty to the following crime(s)

☑ Entered a plea of nolo contendre to the following crime(s)

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COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	ADD'L MONIES IMPOSED
1	Fel Battery	784041	37	_____

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay a sum of Fifty Dollars ($50.00) pursuant to F.S. 960.20 (Crimes Comp. Trust Fund). The Defendant is further ordered to pay the sum of Five Dollars ($5.00) as court cost pursuant to F.S 943.25(4). Fines imposed as part of a sentence pursuant to F.S. 777.083 are to be recorded on the Sentence page(s). *(Check if applicable)*

Stayed & Withheld Imposition of Sentence	( ) The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order)
Sentence Deferred Until Later Date	( ) The Court hereby defers imposition of sentence until _____ (Date)

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(✓) Pay $200.00 Trust Fund pursuant to F.S. 27.3455

Count(s) I: 364 (DAYS) MONTHS BROWARD COUNTY JAIL W/CREDIT 0 DAYS TIME SERVED.

The Defendant in open court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing indigence.

/s/_____
JUDGE

I hereby certify that a true and correct copy of the above and foregoing was served on the State Attorney by: (✓) hand delivery ( ) U.S. mail and to the Defense Attorney by (✓) hand delivery ( ) U.S. mail this 26 day of Sept, 2005.

/s/_____
Deputy Clerk

Appendix N

[1]IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 03 17694-CFlO

STATE OF FLORIDA

vs.

GREGORY WELCH,

Defendant.

SEPTEMBER 26, 2005

PLEA DIRECTLY FOLLOWING *VOIR DIRE*

The above-entitled cause came on for hearing at the Broward County Courthouse, Ft. Lauderdale, Florida, on the 26th day of September, 2005, before Judge Newman, commencing at 1:30 p.m.

[2](THE FOLLOWING PROCEEDINGS WERE HAD FOLLOWING *VOIR DIRE*:)

MR. GILETTE: Judge, we were two weeks away from having this resolved. What happened was, we came up with a resolution. It would be a plea and a straight 364 days in county jail.

Mr. Andrews, the victim, is here. Apparently he approved of that. There is a restitution matter of $350, which was a deductible because he went to the hospital.

As we were working over the lunch hour, what we said, "We'll pay $350 restitution and do the 364 and the case will be finished." The defendant's paycheck will be in within the next week or two. It's supposed to be over a thousand bucks. Then he will be able to pay the $350. His mom is tapped out and his wife because she is dealing with the kids. Let me be more blunt: I will be happy to pay it. I can't technically. A lawyer can't go on the hook for somebody. That is an ethical violation. I can't do any end-runs. It is just not ethical. I'm not going to violate any candor of ethics. They can pay in a week or two. They can bring the money to me. I can write a trust account check. But the problem is, is that the prosecutor wanted the money paid today. I can't pay it today.

THE COURT: Well.

MR. BAPTISTE: Judge, what happened -- the concern of [3]the State Attorney's Office is the money that is owed to the victim. I tried to get a hold of my supervisor to explain what the situation is.

THE COURT: What I could do, if the victim has no objection, if it can't be paid today, I can sentence him to a longer time in the state pen with the understanding that within a certain date — we'll pick the date—two weeks from today he is to pay the victim in the amount of $350. When he does, I will mitigate the sentence back to 364 days plus restitution, which has been paid.

MR. GILETTE: Of course.

THE COURT: That will protect everybody. If he doesn't do it, he is looking at five years in jail. Do you understand what I'm saying?

MS. WELCH (WIFE) : Yeah.

THE COURT: I will sentence him to five years. I will mitigate and you have to give me a date when it will be paid. As long as I know it has been paid, I will mitigate it back to 364 in the state pen -- I mean the county jail.

MR. GILETTE: We can do the plea now and do a voluntary surrender.

MR. BAPTISTE: I want to make sure the victim agrees. State your name for the record.

MR. ANDREW: John Andrew.

THE COURT: I am willing to accept the plea and the [4]fine -- I mean the reimbursement of $350. It cannot be paid today. It is like I'm releasing him for two weeks. I am sentencing him to a much heavier sentence today to be mitigated upon payment to you. We'll pick a date when the payment is due. It's due that day or before.

MR. BAPTISTE: He would start his sentence today, correct?

THE COURT: He could start the sentence today, but I want him kept here in county.

MR. GILETTE: It will be a straight county sentence.

THE COURT: I am sentencing him to more time.

MR. GILETTE: I have a great idea. We have a jury.

We could recess early where they can try to get the bucks together today.

THE COURT: You indicated they couldn't do it.

MR. GILETTE: If he goes in, it will be harder yet. Hold on a second.

MR. BAPTISTE: We're going to have to go forward. The victim just represented to me that the defendant looked at him and told him, "It's not over."

Based on that, there is no deal on the table. The victim just expressed to me he is afraid for his life.

THE COURT: Well, I can't get involved in that. Do we have a plea worked out or we don't? Do you want to say something on the record?

[5]MR. ANDREWS: He told me "It's not over", so I don't know what that means.

MR. BAPTISTE: There is no offer on the table. I'm sorry.

THE COURT: The State is withdrawing the offer because of something that was said to the victim. That's all I know. So there is no offer on the table?

MR. BAPTISTE: No, Your Honor.

MR. GILETTE: Judge, I'm trying to do eight things at once. What happened to the deal?

THE COURT: According to the victim. the defendant said to him, "It's not over."

MRS. WELCH (DEFENDANT'S MOTHER): No, he didn't.

MS. WELCH (DEFENDANT'S WIFE): No, he didn't.

MR. GILETTE: We're trying to get it over with. Was that interpreted as a threat?

THE COURT: Yes.

MR. BAPTISTE: Judge, if I can have a moment to speak to the victim.

MR. GILETTE: I've handed the Court a copy of the plea form. He has filled it out. Let me make sure it is the same form. I got it out of Judge Murphy's courtroom.

Judge, here is what is going on over the continuing saga: Mr. Andrew -- in fact, I will hand it to the prosecutor. I'm handing him $350 in cash.

[6]MR. BAPTISTE: I am now handing it to the victim.

MR. GILETTE: I have received a check from the defendant's mother for $100. Based on that check, now that I have been paid, I was lucky enough to have $100 with me. At his request, I have the check here. I gave him the 100 bucks so we don't have any ethical problems.

The $350, which has been handed to Mr. Andrew and acknowledged in court, did you get the $350?

MR. ANDREW: Yes, sir.

MR. GILETTE: That's the full and final restitution. We all know what we're trying to do here -- this resolves everything.

Based on that, at this point the defendant is going to withdraw his plea of not guilty and he has filled out his form. He'll plead no contest. He is going to get adjudicated guilty to the felony battery, which is a third degree felony, $5,000 fine, and sentenced to 364 days; no credit for time served because that's how the negotiation is.

Based upon that, we are confident he will do — well, he will get more credit against the one year than he would for the 85 percent in the prison system. This is in his best interest. His wife is here. His mom is here. We had a

tearful conversation over the week or so. They understand the risks.

[7]THE BAILIFF: Would you like me to put the jury in the jury room until you finish? They're coming back from lunch.

THE COURT: Sure. Give him a second to get the jury in there.

MR. GILETTE: Based on the fact he does have a considerable risk in this case, based on the fact he wanted to put this behind him and do the right thing, and based on the fact, interestingly enough, I can do a great job, the jury can come back with a compromised verdict and say, "We're not going to find you guilty of the felony, but of simple battery." He can still face the same 364. So we manipulated on the time served to make sure everybody is getting what they need to get. He has some time served in case. We're giving that up in order to negotiate on that. Mom is aware of this. He is aware of this. Nobody is happy to go to jail.

After taking a deep breath and getting to where we are, I think the emotions can calm down on both sides. I spoke to everybody and said no more contact or dirty looks on either side. It happened two years ago. The head has healed.

MR. BAPTISTE: Part of the terms and continuing conditions is that the defendant have no contact with the victim in this case.

[8]Judge, I have some case law. David Fulcher versus State of Florida, 875 So. 2nd 647, this case basically stands for the proposition that the defendant has to affirmatively waive his right for credit time served.

I want to make sure the defendant understands this plea offer on the record. He is to waive any credit for time served.

THE COURT: I will ask him that when he is under oath. Will you swear him in, please?

DEFENDANT GREGORY WELCH,

HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: Tell the Court your name.

THE DEFENDANT: Gregory Welch.

THE COURT: Are you over the age of 21?

THE DEFENDANT: Yes.

THE COURT: How far did you go in school?

THE DEFENDANT: I have my GED and one year of junior college.

THE COURT: Have you had an opportunity to discuss this case with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: One-hundred percent.

THE COURT: Did he go over the facts of the case, [9]the charges against you, any defenses you may have, and certain rights you give up when you enter this plea of no contest?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone forced you or threatened you to enter this plea?

THE DEFENDANT: No.

THE COURT: Has anyone promised you anything other than what you have heard here in court?

THE DEFENDANT: No.

THE COURT: Are you now taking or under the influence of any drugs or alcohol or medicine of any kind?

THE DEFENDANT: No.

THE COURT: You know exactly what you're doing — entering a no-contest plea to this charge?

THE DEFENDANT: Yes sir.

THE COURT: Also, you understand you are giving up any rights you have for time served. You will have to serve 364 days in the Broward County Jail. You understand that?

THE DEFENDANT: Yes.

THE COURT: You will surrender your time-served days. You are giving them up. You understand that?

THE DEFENDANT: (NODDING).

MR. BAPTISTE: I wanted to make sure he says "yes" [10]so the court reporter can get it.

MR. GILETTE: He hesitated. He is not giving up credits he will earn — just what he has done.

THE COURT: Right.

MR. GILETTE: We're hoping he will be able to earn some time.

THE COURT: That we have no control over. I have to ask: Is this going to affect anything you have with immigration or naturalization? If he serves it, it doesn't matter whether it applies or not.

I want to go over some rights you give up. If there is anything you don't understand, stop me and confer with your attorney.

If you did not enter this plea, you have the right to be tried by the jury or judge; the right to remain silent during the trial. The attorney will cross-examine any of the state witnesses and you can call witnesses on your own behalf, and the State would have the burden of proving your guilt beyond a reasonable doubt. And if you are convicted at the time of trial, you can appeal to the Court.

You understand, by entering this plea, you are giving up these rights?

MR. BAPTISTE: How many days does he have?

THE CLERK: 281 days.

[11]MR. BAPTISTE: Okay.

THE COURT: You are doing this of your own free will and you feel this is in your best interest?

THE DEFENDANT: Yes.

THE COURT: The Court finds the defendant, Gregory Welch, has freely and voluntarily entered this plea, understands the charges against him; is competent, both physically and mentally; and is certainly represented by competent counsel.

In the matter of State of Florida versus Gregory Welch, 03-17694-CF10, based upon this plea, the Court will adjudicate him guilty; sentence him to 364 Broward County Jail; and he's giving up any credit for time served

in reference to this particular matter. And I hope he does his time, gets out. Also he needs to keep away and not have any contact with the victim in this case. That is physical contact, phone contact — anything else anyone can think of. No contact whatsoever with the victim in this case.

Also there was $350 restitution paid to the victim in this matter. That brings this matter to a conclusion. He will be fingerprinted.

THE CLERK: You have to impose court costs. You can convert them to a civil lien.

THE COURT: I will convert to a civil lien.

[12]MR. GILETTE: Thank you.

THE BAILIFF: we remand him into custody today?

THE COURT: Yes. Let's bring the jury in and excuse them.

APPENDIX O — WELCH'S SENTENCING MEMORANDUM AND SELECT ATTACHMENTS, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED SEPTEMBER 15, 2010

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY WELCH,

Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, Gregory Welch, by and through his undersigned counsel, submits this sentencing memorandum. In doing so, Defendant states the following:

1. Defendant previously filed an objection to his classification in the presentence investigation report (PSI) as an armed career criminal. According to the Armed Career Criminal Act (herinafter, "ACCA"):

Appendix O

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such persons shall be fined under this title and imprisoned not less than fifteen years...

18 U.S.C. § 924(e)(1).

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year... that—
>
> > (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

18 U.S.C. § 924(e)(2)(B).

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The PSI relies on three prior convictions in recommending that this Court find that Defendant is subject to the enhanced penalties of the ACCA (PSI, ¶24). Of these three convictions, Defendant Welch submits that his robbery conviction in case number 96-5680 CF10 should not be considered a crime of violence.

2. In the aforementioned robbery, Defendant was charged by Information with "strong armed robbery" which involved the unlawful taking of property "by the use of force, violence, assault, or putting in fear... contrary to F.S. 812.13(1) and F.S. 812.13(2)(c)." (Appendix). As evidenced by the judgment (appendix) Defendant pled guilty to the crime charged. Nothing in either the Information or Judgment establishes the manner in which robbery was committed. The question, therefore, is whether this robbery constitutes a crime of violence.

3. Under 18 U.S.C. § 924(e)(2)(B)(i) a crime of violence is one that has an element the use, attempted use, or threatened use of physical force against the person of another. As stated by the Supreme Court: "We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force — that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, _ U.S. _, 130 S.Ct. 1265, 1271 (2010) (emphasis original). In *Montsdoca v. State*, 93 So. 157 (Fla. 1922) the Florida Supreme Court stated:

> It will be observed from a careful reading of the statute that there are several alternative

> ingredients of the crime of robbery. If property the subject of larceny is unlawfully taken from another either by force or violence or by assault or by putting in fear, the offense denounced by the statute is committed. The indictment charges these alternative ingredients of the offense conjunctively, and the charge should be sustained if either alternative ingredient is proven.

Id. at 85.

The Florida Supreme Court also noted that the degree of force is immaterial. *Id.* at 86. *See also Johnson v. State*, 612 So.2d 689, 690 (Fla. 1st DCA 1993). Accordingly, a robbery under Florida law can be committed without using *violent* force; as comtemplated by 18 U.S.C. § 924(e)(2)(B)(i).

3. There remains the question of whether Defendant's conviction for robbery can be classified as a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii). Specifically, whether the robbery conviction at issue "involves conduct that presents a serious potential risk of physical injury to another." In this regard, the Supreme Court has stated that for a crime to constitute a violent felony under clause (ii), it must "involve purposeful, 'violent' and 'aggressive' conduct." *Begay v. United States*, 553 U.S. 136, 144-145, 128 S.Ct. 1581, 1586 (2008). As discussed above, under Florida law, robbery does not necessarily involve purposeful, violent, and aggressive conduct, and is therefore not a crime of violence under 18 U.S.C. § 924(e)(2)(B)(ii).

4. Based upon the foregoing, Defendant submits that the aforementioned robbery conviction is not a crime of violence under the ACCA and he should therefore not be classified as an armed career criminal.

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Peter Birch
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Appendix O

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA,

v.

GREGORY WELCH

INFORMATION FOR
I. STRONG ARMED ROBBERY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that GREGORY WELCH on the 9th day of February, A.D. 1996, in the County and State aforesaid did unlawfully take from the person or custody of Joshua Cummings certain property of value, to-wit: jewelry, with the intent to permanently or temporarily deprive Joshua Cummings of a right to the property or a benefit therefrom, by the use of force, violence, assault, or putting the said Joshua Cummings in fear, contrary to F.S. 812.13(1) and F.S. 812.13(2)(c).(L-6)

MWM/sef/3/26/96

Appendix O

17th Judicial Circuit in and for Broward County

DIVISION: CRIMINAL **DIV: FA**

JUDGMENT

THE STATE OF FLORIDA VS. CASE NUMBER

DEFENDANT GREGORY WELCH 96-5680 CF 10

☐ Probation Violator
(Check if Applicable)

State Attorney Y. Conzo
Court Reporter B. Tanner

The Defendant, Gregory Welch being personally before this Court represented by S. Smith, his attorney of record, and having:

(Check applicable provision)

☐ Been tried and found guilty of the following crime(s).

☑ Entered a plea of guilty to the following crime(s).

☐ Entered a plea of nolo contendere to the following crime(s).

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COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	ADD'L MONIES IMPOSED
1	Strong Arm Robbery	812.13(1)	2F	_____

and no cause having been shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay a sum of Fifty Dollars ($50.00) pursuant to F.S. 960.20 (Crimes Comp. Trust Fund). The defendant is further ordered to pay the sum of Five Dollars ($5.00) as court costs pursuant to F.S. 948.25(4) (WAIVED).

(Check if applicable)

( ) The Defendant is further ordered to pay a fine in the sum of $ ___ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s).

( ) The Court hereby imposed additional court costs in the sum of $ _____

Appendix O

Imposition of Sentence Stayed & Withheld	( ) The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order.)
Sentence Deferred Until Later Date (check if Applicable)	( ) The Court hereby defers imposition of sentence until _____. (Date)
	( ) Pay $200.00 Trust Fund pursuant to F.S. 27.3455 (WAIVED).

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

COUNT(S) ___ : ___ DAYS BROWARD COUNTY

JAIL W/CREDIT FOR _____ DAYS TIMES SERVED

APPENDIX P — WELCH'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ENTERED AUGUST 20, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60212-CR-MARRA/VITUNAC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY WELCH,

Defendant.

OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

Defendant, Gregory Welch, by and through his undersigned counsel, submits the following objections to the presentence investigation report (PSI).

1. As to paragraph 15, Defendant submits that felony battery, the offense of conviction in case no. 2003-CF-17694, and robbery, the offense of conviction in case no. 1996-CF-005680, should not be considered crimes of violence. Accordingly, as Defendant has only one prior conviction for a crime of violence, under U.S.S.G. § 2K2.1(a)(4) his base offense level is 20.

2. As to paragraph 21, Defendant objects to his classification as an armed career criminal in that the aforementioned convictions are not crimes of violence.

3. As to paragraph 24, based upon the foregoing, Defendant's total offense level is 17.

4. As to paragraphs 26 through 36, Defendant objects to the allegations contained therein. Furthermore, pursuant to *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 2005), it is inappropriate to rely on the allegations in the arrest and booking sheet for the alleged circumstances of a prior offense. Therefore, the paragraphs purporting to provide the circumstances of the offenses contained within the aforementioned paragraphs should be removed from the PSI unless obtained from "the charging document, the terms of a plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26, 125 S.Ct. at 1263.

5. As to paragraph 86, Defendant submits that based upon an offense level 17, criminal history category VI, his advisory guideline range is 51 to 63 months imprisonment.

Appendix P

KATHLEEN M. WILLIAMS
FEDERAL PUBLIC DEFENDER

s/ Peter Birch
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APPENDIX Q — INDICTMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, FILED AUGUST 20, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about March 19, 2009, in Broward County, in the Southern District of Florida, the defendant,

GREGORY WELCH,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and

affecting interstate and foreign commerce, that is: (a) one (1) Lorcin, Model L380, .380-caliber automatic pistol, serial number 532504; (b) five (5) rounds of Winchester .380-caliber ammunition; and (c) one (1) round of Remington .380-caliber ammunition; any one of which being a violation; in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE

A. The allegations of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of property in which the defendant has an interest, pursuant to the provisions of Title 18, United States Code, Section 924(d)(1), as incorporated by Title 28, United States Code, Section 2461, and the procedures outlined at Title 21, United States Code, Section 853.

B. Upon the conviction of any violation of Title 18, United States Code, Section 922(g)(1), the defendant, **GREGORY WELCH,** shall forfeit to the United States of America any firearm and ammunition involved in or used in the commission of said violation.

All pursuant to, Title 18, United States Code, Section 924(d)(1); Title 28, United States Code, Section 2461; and Title 21, United States Code, Section 853.

A TRUE BILL

/s/_____
FOREPERSON

Appendix Q

/s/
JEFFREY H. SLOMAN
ACTING UNITED STATES ATTORNEY

/s/
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY

Appendix Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

UNITED STATES OF AMERICA

vs.

GREGORY WELCH,

Defendant.

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

New Defendant(s) Yes ☐ No ☐
Number of New Defendants ☐
Total number of counts ☐

Court Division: (Select One)

☐ Miami ☐ Key West ☒ FTL ☐ WPB ☐ FTP

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of

* Penalty Sheet(s) attached

probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
   List Language and/or dialect _____

4. This case will take 2 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)			(Check only one)	
I	0 to 5 days	☒	Petty	☐
II	6 to 10 days	☐	Minor	☐
III	11 to 20 days	☐	Misdem.	☐
IV	21 to 60 days	☐	Felony	☒
V	61 days and over	☐		

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)

Has a complaint been filed in this matter?
(Yes or No) No

Appendix Q

If yes:
Magistrate Case No. _____
Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of _____
Rule 20 from the _____ District of _____

Is this a potential death penalty case?
(Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ☐ Yes ☒ No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ☐ Yes ☒ No

/s/_____
JASON LINDER
ASSISTANT UNITED STATES ATTORNEY
Court No. A5501149

Appendix Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PENALTY SHEET

Defendant's Name: GREGORY WELCH No.: _____

Count #1:
Felon in Possession of Firearm or Ammunition; in violation of 18 U.S.C. § 922(g)(1)

*Max Penalty: 10 years' imprisonment; 3 years supervised release; and $250,000 fine

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms or forfeitures that may be applicable.**